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Title: United States Petitioner
v.
California and California State Board of Equalization

Docketed:
June 12, 1992

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Tyler,Robert F., Milam,Robert D.

Entry	Date	Note	Proceedings and Orders
1	Jun 12 1992	G	Petition for writ of certiorari filed.
3	Jun 29 1992		Order extending time to file response to petition until August 12, 1992.
5	Aug 11 1992		Brief of respondents California, et al. in opposition filed.
4	Aug 12 1992		DISTRIBUTED. September 28, 1992
6	Aug 20 1992	X	Reply brief of petitioner filed.
7	Oct 5 1992		Petition GRANTED.
			**********
8	Nov 18 1992		Joint appendix filed.
9	Nov 18 1992		Brief of petitioner United States filed.
11	Dec 23 1992		Brief of respondents California, et al. filed.
10	Dec 28 1992		SET FOR ARGUMENT TUESDAY, FEBRUARY 23, 1993.(2ND CASE).
12	Dec 28 1992		Brief amici curiae of Arizona, et al. filed.
13	Dec 28 1992		Brief amici curiae of Council of State Governments, et al. filed.
14	Jan 4 1993		CIRCULATED.
16	Jan 29 1993	X	Reply brief of petitioner filed.
15	Feb 1 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
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18	Feb 23 1993		Record filed.
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91-2003

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

DAVID ENGLISH CARMACK
JOHN J. MCCARTHY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, in invoking the federal cause of action for money had and received (*indebitatus assumpsit*) to recover state taxes unlawfully collected from a federal contractor, the United States must comply with the state-law requirements (i) that an administrative tax refund claim be filed as a precondition to suit for refund (Cal. Rev. & Tax. Code § 6932 (West 1987)) and (ii) that suit for refund be commenced within 90 days of the administrative denial of the refund claim (Cal. Rev. & Tax. Code § 6933 (West 1987)).

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 932 F.2d 1346. The opinion of the district court (App., *infra*, 16a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 25a) was entered on May 16, 1991. A timely petition for rehearing with a suggestion of rehearing en banc was denied on March 18, 1992 (App., *infra*,

24a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 2415(a) provides, in relevant part:

> * * * [E]xcept as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues * * *.

2. Cal. Rev. & Tax. Code § 6932 (West 1987) provides, in relevant part:

> No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed * * *.

3. Cal. Rev. & Tax. Code § 6933 (West 1987) provides, in relevant part:

> Within 90 days after the mailing of the [Equalization Board's] action upon a [refund] claim * * *, the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in any city or city and county of this state in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> Failure to bring action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

STATEMENT

1. During the period from 1975 to 1981, the United States Department of Energy and the United States Department of the Navy contracted with Williams Brothers Engineering Company (WBEC) to manage oil drilling operations being conducted at Naval Petroleum Reserve No. 1 in California (App., *infra*, 2a).[1] Under the contracts with WBEC, the United States agreed to pay a management fee and to reimburse WBEC for various types of costs—including specifically any sales or use taxes—that WBEC incurred in managing the federal property. WBEC was prohibited from performing any construction work on federal property under the contracts; instead, all construction work was to be performed either by the United States or by subcontractors (*id.* at 16a; CR 27, Attachments 2, 3; CR 28 at 4-9).[2]

Pursuant to these contracts, WBEC procured goods and services required for operation of the Naval Petroleum Reserve (App., *infra*, 2a; CR 28 at 3). Title to items of personal property purchased for use at the Reserve passed directly to the United States at the time of purchase. This property was either stored as inventory at the Reserve or was used by govern-

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[1] The Naval Petroleum Reserve was established pursuant to Section 1 of the Pickett Act of 1910, ch. 421, 36 Stat. 847 (43 U.S.C. 141), which was repealed and replaced by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (43 U.S.C. 1701 *et seq.*). Authority to administer NPR-1 is conferred on the Department of the Navy (10 U.S.C. 7420-7438) and the Department of Energy (42 U.S.C. 7156).

[2] "CR" references are to the docket control numbers assigned to documents in the original record by the Clerk of the district court and transmitted to the court of appeals.

ment personnel or by subcontractors in conducting oil field operations (App., *infra*, 2a; CR 27 at 6 & Attachments 2 (§ VIII, ¶¶ (b) and (c)), 3 (¶ 7(a)); CR 28 at 4)).

2. During the years 1975 through 1981, the State of California assessed sales and use taxes in the amount of $14,136,853 for WBEC's purchases of personal property for use at the Naval Petroleum Reserve (App., *infra*, 16a). The assessments were made pursuant to Section 6384 of the California Revenue and Taxation Code (hereafter the California Code), which taxes sales of personal property to federal contractors "for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State." Cal. Rev. & Tax. Code § 6384 (West 1987). WBEC paid the State's assessments under protest, with funds provided by the United States pursuant to the federal contracts (App., *infra*, 2a).

WBEC thereafter filed timely administrative refund claims with the California Board of Equalization pursuant to Section 6902 of the California Code (App., *infra*, 2a, 18a-19a). The basis for the refund claims was that, under its contracts with the United States, WBEC did not use the property it purchased for "the construction of improvements" and that its purchases were therefore outside the scope of the State's tax provision (*id.* at 2a). When the administrative refund claims were disallowed, WBEC commenced an action in state court for refund of taxes pursuant to Section 6933 of the California Code (App., *infra*, 2a). The United States was not joined as a party to that action.

During the pendency of the state court proceedings, the State conceded that approximately $3 million of

its assessments were invalid because the property involved had been used or installed by government personnel (App., *infra*, 2a). The State therefore agreed to refund that portion of the taxes it had collected. The State continued to maintain, however, that the remaining $11 million it had assessed and collected—for personal property purchased by WBEC but installed by other contractors—was authorized under state law (*ibid.*).

By agreement of the parties, WBEC dismissed its state court action without prejudice. The validity of the remaining $11 million of the State's assessment, and of the claim for refund of that amount, was thus left unresolved (App., *infra*, 2a).

3. The United States then filed this action in federal district court seeking: (i) a declaration that the California tax was inapplicable to WBEC's purchases of personal property because WBEC was not engaged in the "construction of improvements" as required by Section 6384 of the California Code; and (ii) a judgment for damages against the State in the amount of $11 million, plus interest, for money had and received under the State's invalid tax assessment (App., *infra*, 2a-3a).

The district court granted summary judgment to the State. The court first concluded that the United States had no right to recover the taxes under state law because the government had not made a timely administrative refund request (as required by Section 6902 of the California Code) and had not commenced this action within 90 days of the denial of the administrative refund claim filed by WBEC (as required by Section 6933 of the California Code). The court concluded that compliance with these state procedures was "a condition precedent" to the State's liability in a statutory refund suit (App., *infra*, 17a (quoting

United States v. *California*, 655 F.2d 914, 918-919 (9th Cir. 1980)). In the court's view, compliance with these procedures was an "element of [the plaintiff's] cause of action" (*ibid.* (quoting *United States* v. *California*, 655 F.2d at 918-919)). Since the United States had not complied with those procedures, the court concluded that the United States could not obtain recovery under the State's refund statute (App., *infra*, 19a-20a & n.3).

The district court further concluded that the United States was not entitled to seek recovery of taxes from the State under the quasi-contractual common law action of money had and received (*indebitatus assumpsit*). The court stated that an action in quasi-contract cannot "be stretched to include state taxes [paid] under a disputed state statute" (App., *infra*, 21a). The court found no "unjust enrichment" of the State, even if the taxes were wrongfully collected, because there was no "unjustness in the State procedures" available for challenging the assessment (*id.* at 23a).

4. The court of appeals affirmed (App., *infra*, 1a-15a). The court acknowledged that numerous decisions have held that the United States "may maintain a quasi-contract action independent of state law" for recovery of state-imposed taxes, but the court stated that those cases "involved classic cases of unjust enrichment" (*id.* at 9a). The court concluded that "[t]his case does not involve classic unjust enrichment such as simple overpayment," but instead is based upon "a state-created exemption from a state created sales tax" (*ibid.*). The court held that any right of recovery, in this situation, was subject to compliance with state administrative procedures for refund claims and with the state-law requirement

that an action for refund be commenced within 90 days of administrative denial of the refund claim (*id.* at 9a-10a, 12a). Since the United States had not complied with those state-law procedures, the court concluded that the State's retention of the allegedly invalid tax did not represent an instance of "classic unjust enrichment" (*id.* at 14a).

In so ruling, the court acknowledged (App., *infra*, 12a-14a) that the recent decision of the Eleventh Circuit in *United States* v. *Broward County*, 901 F.2d 1005 (1990), had reached the opposite conclusion on indistinguishable facts. In *Broward County*, the court of appeals concluded that the United States was entitled to recover invalid state taxes assessed against a federal contractor under the "federal common law cause of action in quasi-contract for money had and received" and that "the state statute [imposing a 60-day claim filing deadline] has no application to [that] action" (App., *infra*, 13a (quoting *United States* v. *Broward County*, 901 F.2d at 1008-1009)). The Ninth Circuit stated that it disagreed with the Eleventh Circuit's decision in *Broward County* because "there was no unjust enrichment in * * * *Broward County*, and there is none in the case at bar" (App., *infra*, 13a).

REASONS FOR GRANTING THE PETITION

The decision in this case departs from the established rulings of this Court that authorize the United States—without regard to conflicting state-law procedures or remedies—to invoke the common law action of "money had and received" to recover money belonging to the United States that has been unlawfully obtained by the States or other parties. As the court of appeals recognized (App., *infra*, 12a-14a), its holding that the United States may not invoke

federal law to recover unlawfully exacted state taxes unless the United States has complied with state-law procedures applicable to state tax refund claims conflicts with *United States* v. *Broward County*, 901 F.2d 1005 (11th Cir. 1990). The decision also conflicts with decisions of several other courts of appeals. See *United States* v. *Michigan*, 851 F.2d 803, 810 (6th Cir. 1988); *United States* v. *DeKalb County*, 729 F.2d 738, 740 (11th Cir. 1984); *United States* v. *District of Columbia*, 669 F.2d 738, 741-742 (D.C. Cir. 1981); *City of New Orleans* v. *United States*, 371 F.2d 21, 28 (5th Cir.), cert. denied, 387 U.S. 944 (1967).

This case involves the standard federal services contract used by the Department of Energy and other federal agencies for the private management of federal facilities. Many tax controversies with local taxing authorities throughout the United States have been generated under this standard services contract. As in the present case, these controversies often involve substantial sums of money. By departing from the previously uniform authority that permits the United States to pursue the common law action for money had and received without complying with state-law refund procedures, the decision in this case creates a conflict among the circuits on a recurring issue of substantial administrative importance.

1. From its earliest decisions, this Court has recognized the common law action known as "money had and received" (*indebitatus assumpsit*), under which a plaintiff may recover money belonging to him that the defendant holds without lawful right.[3] See

[3] This cause of action exists whether the defendant has received the money directly from the plaintiff or through an intermediary or other third party. See *Gaines* v. *Miller*, 111 U.S. 395, 397 (1884); *Bayne* v. *United States*, 93 U.S. 642, 643 (1877); *Galante* v. *Commodity Credit Corp.*, 71 F. Supp. 963, 966 (S.D. Cal. 1947). It is sufficient for the plaintiff to show that the money equitably belongs to him, even if it was paid to the defendant by another. *Bayne* v. *United States*, 93 U.S. at 643.

Elliott v. *Swartwout*, 35 U.S (10 Pet.) 137, 156-157 (1836); *Bend* v. *Hoyt*, 38 U.S. (13 Pet.) 263, 265-266 (1839); *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) 720, 731-732 (1866); *Dooley* v. *United States*, 182 U.S. 222, 228 (1901).[4] One of the earliest applications of this quasi-contractual claim for relief in this Court was to provide a judicial remedy for the recovery of unlawfully exacted taxes. See *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) at 156-157; *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) at 731-732.[5] The right of the United States to invoke this cause of action to recover taxes and other funds unlawfully held by the States or others arises under federal common law: "[n]o statute is necessary to authorize the United States to sue in such a case." *United States* v. *Wurts*, 303 U.S. 414, 415 (1938) (quoting *United States* v. *Bank of the Metropolis*, 40 U.S. (15 Pet.) 377, 401 (1841)).

[4] See also *Moses* v. *Macpherlan*, 2 Burr. 1005, 1012, 96 Eng. Rep. 120, 120-121 (K.B. 1759); *United States* v. *Compagnie Generale Transatlantique*, 26 F.2d 195 (2d Cir. 1928).

[5] Although the action for money had and received is often based upon a mistaken or fraudulent payment (see, *e.g.*, *United States* v. *Wurts*, 303 U.S. 414, 416 (1938); *Bayne* v. *United States*, 93 U.S. at 643), the common law remedy is also applicable to "involuntary" tax payments made under "compulsion of law, or under protest, or with notice that [the plaintiff] intends to bring suit to test the validity of the [tax] claim." *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) at 731-732.

The court of appeals did not dispute (App., *infra*, 9a) that a cause of action for "money had and received" exists in favor of the United States. Instead, the court concluded that this federal cause of action is unavailing when the State provides a state-law refund procedure with which the United States has not complied. The court's reasoning is that, if the United States has not pursued available state-law refund procedures, the State's retention of unlawfully collected taxes does not represent "classic unjust enrichment" (App., *infra*, 14a-15a). The court therefore concluded that the federal remedy was inapplicable in these circumstances (*ibid.*).

This reasoning conflicts with the long line of decisions of this Court holding that, when the United States brings suit to recover unlawfully exacted State taxes, its rights are *not* circumscribed or limited by state procedures, state statutes of limitation, or "state notions of laches" (*Board of County Comm'rs* v. *United States*, 308 U.S. 343, 349-351 (1939)).[6] See also *United States* v. *John Hancock Mutual Life Ins. Co.*, 364 U.S. 301, 308 (1960); *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940). It is federal law, not state law, that provides procedures and rules of limitation for federal common law causes of action. See *Board of County Comm'rs*, 308 U.S. at 350-352. The federal cause of action for money had and received is based upon a contract "implie[d in law]" (*Bayne* v. *United States*, 93 U.S. at 643); it is therefore subject to the six-year statute of limitations set forth in 28 U.S.C. 2415(a) for claims "brought by the United States * * * upon any contract * * * implied in law" (*ibid.*). See *United States* v. *Broward County*, 901 F.2d at 1008; *United States* v. *Michigan*, 851 F.2d at 810. The federal claim is not subject to conflicting or additional state limitations or procedural requirements. *Ibid.*

[6] The 90-day suit commencement provision under state law (Cal. Rev. & Tax. Code § 6933 (West 1987)) does not purport to represent a "condition precedent" to the state-law refund action, as the district court erroneously concluded (App., infra, 17a). Instead, it purports to effect "a waiver of any demand against the state" in the event that the action is not commenced within "the time specified" (Cal. Rev. & Tax. Code § 6933 (West 1987)). The waiver effected by this provision is precisely the type of state-law restriction on federal recoveries that this Court, and the courts of appeals, have refused to allow. See, *e.g.*, *Board of County Comm'rs* v. *United States*, 308 U.S. at 349-351; *City of New Orleans* v. *United States*, 371 F.2d at 28.

Prior to the decision in this case, the courts of appeals consistently agreed with this conclusion. See *United States* v. *Broward County*, 901 F.2d at 1007-1009; *United States* v. *Michigan*, 851 F.2d at 810; *United States* v. *DeKalb County*, 729 F.2d at 741-742; *United States* v. *District of Columbia*, 669 F.2d at 741-742; *City of New Orleans* v. *United States*, 371 F.2d at 28. For example, in *Broward County*, the Eleventh Circuit held that the claim of the United States for recovery of state taxes paid by a federal contractor was not subject to the state-law requirement that suit be commenced within 60 days of certification of the state tax rolls. 901 F.2d at 1008. The court held (*id.* at 1008-1009):

> [T]he cause of action asserted by the government is not a state law judicial remedy or cause of action but is a federal common law cause of action in quasi-contract for money had and received. In these circumstances the state statute has no application to this action.

The Sixth Circuit expressed the same view in rejecting application of the state statute of limitations to a federal action for recovery of state taxes in *United States* v. *Michigan*, 851 F.2d at 810. Similarly, in *City of New Orleans* v. *United States*, in rejecting the State's argument that the United States was bound by state procedural restrictions in asserting the federal claim for recovery of taxes unlawfully assessed against a federal contractor, the Fifth Circuit observed that it was the "usual principle that Federal law fashions remedies for recovery of funds or property of the United States—including those from invalid tax exactions." 371 F.2d at 28.

The court of appeals acknowledged that its decision in this case conflicts with the decision of the Eleventh Circuit in *Broward County*. The court simply concluded that *Broward County* was wrongly decided (App., *infra*, 14a) because there is no "classic unjust enrichment" when a state-created remedy is not pursued (*id.* at 14a-15a). This analysis turns the Supremacy Clause on its head. The existence of a state remedy cannot preempt a federal remedy for recovery of funds belonging to the United States. Prior to the decision in this case, no court had held that the United States must comply with varying state practices as a condition precedent to recovery of its property under the federal cause of action for money had and received. The focus of the action for money had and received is upon the existence, or lack, of lawful right of the defendant to hold the plaintiff's money; the State cannot rely upon state-created procedures to avoid an accounting under federal law for its unlawful possession of money belonging to the United States. Federal law creates, and governs, the right of the United States to recover its own funds.

See *Board of County Comm'rs* v. *United States*, 308 U.S. at 349-351.

The decision of the court of appeals would often leave the United States without an effective remedy to contest a tax improperly exacted from a federal contractor for which the United States ultimately is responsible. Many States, including California (Cal. Rev. & Tax. Code § 6932 (West 1987)), require that an administrative claim be presented prior to initiation of a state refund suit. These States often allow only the putative taxpayer, not third parties, to file an administrative refund claim and challenge a tax assessment by a statutory refund suit. See *State Board of Equalization* v. *Superior Court*, 111 Cal. App. 3d 568 (1980). Other States condition any claim for refund on the requirement that the taxes be paid under protest. See *United States* v. *DeKalb County*, 729 F.2d at 741-742. Even if those States allowed the United States to protest the taxes imposed upon federal contractors, the United States often is not aware of the tax (or the legal issue involved) in sufficient time to participate effectively in the state administrative process. Protesting the payment and preparing and filing the state administrative claim for refund would, as a practical (and often legal) necessity, have to be done by the federal contractor in most instances.

If the state-law requirements for a state-created refund action were enforced upon the United States, the United States would thus often be effectively deprived of its right to challenge and obtain recovery of taxes unlawfully exacted by the States. It is apparent that confusion would reign under the decision in this case if the United States were left to the laws of the 50 States, and to the diligence of fed-

eral contractors,[7] for enforcement of the government's claim for money had and received. Other courts of appeals have rejected the claim that the United States should be subjected to this manifest confusion, because it is the "usual principle that Federal law fashions remedies for recovery of funds or property of the United States" (*City of New Orleans* v. *United States*, 371 F.2d at 28).

2. The question presented in this case has substantial, recurring administrative importance. The case arises out of the relationship that exists between the United States and a private contractor under the standardized federal service contract used for the management of federally owned facilities. This standardized contract is used not only by the Department of Energy and other civilian departments but also by the armed services. It applies to numerous federal facilities, many of which are located in the Ninth Circuit where the present case arose. The state tax issues that emanate from these contracts often involve large sums of money and often lead to

[7] In *United States* v. *Anderson County*, 761 F.2d 1169 (6th Cir.), cert. denied, 474 U.S. 919 (1985), the United States was permitted to challenge a tax assessment against Union Carbide, a federal contractor. The Sixth Circuit held that Union Carbide had no beneficial interest or use in the Department of Energy's nuclear facility at Oak Ridge, Tennessee, which had been subjected to the Tennessee tax. The court noted that Union Carbide had contradicted the United States' claims by alleging in separate tax proceedings in California that Union Carbide had exclusive possession and use of the nuclear facility, but the court concluded that this statement by Union Carbide was not binding on the United States. The *Anderson County* case is an example of the difficulty that the United States would have in relying upon a federal contractor to protect the government's interest in state tax proceedings.

litigation. See, *e.g.*, *United States* v. *New Mexico*, 455 U.S. 720 (1982); *United States* v. *City of Manassas*, 830 F.2d 530 (4th Cir. 1987), aff'd, 485 U.S. 1017 (1988); *United States* v. *Anderson County*, 705 F.2d 184 (6th Cir.), cert. denied, 464 U.S. 1017 (1983); *United States* v. *Washington*, 654 F.2d 570 (9th Cir. 1981), rev'd, 460 U.S. 536 (1983); *United States* v. *Colorado*, 627 F.2d 217 (10th Cir. 1980), aff'd *sub nom. Jefferson County* v. *United States*, 450 U.S. 901 (1981).[8] The decision of the court of appeals will lead to significant uncertainty in the protection of the rights of the United States to recover taxes unlawfully exacted by the States and will multiply the instances in which litigation is required to perfect the government's right to recover the large sums often at stake.

CONCLUSION

The petition for a writ of certiorari should be granted.[9]

[8] The same question addressed in this case is also currently pending in the Eighth Circuit in *United States* v. *Duane Benton*, No. 91-2206 WMKC (argued on Jan. 9, 1992).

[9] In light of the previously consistent decisions of the courts of appeals on the issue presented in this case, and because the decision below allows state procedures to preempt the federal remedy in a manner inconsistent with *Board of County Comm'rs* v. *United States*, 308 U.S. at 351 ("state notions of laches and state statutes of limitations have no applicability to suits by the Government"), the Court may wish to consider summary reversal.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

DAVID ENGLISH CARMACK
JOHN J. MCCARTHY
Attorneys

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89-15833

D.C. No. CIV S-88-600 LKK-EM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

STATE OF CALIFORNIA AND CALIFORNIA STATE BOARD OF EQUALIZTION, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
July 20, 1990—San Francisco, California

Filed May 16, 1991

Before: Arthur L. Alarcon and Cecil F. Poole,
Circuit Judges and Terry J. Hatter,* District Judge

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* The Honorable Terry J. Hatter, Jr., United States District Court Judge for the Central District of California, sitting by designation.

OPINION

HATTER, District Judge:

FACTS

The United States, through the Departments of the Navy and Energy, contracted with Williams Brothers Egineering Company ["WBEC"] to manage oil drilling operations on federal land in California. California assessed WBEC $14 million in sales and use taxes for the years 1975 through 1981. The assessments were made pursuant to section 6384 of California's Revenue & Taxation Code, which imposes sales and use taxes against federal construction contractors. WBEC was informed of the assessments through notices of tax deficiencies issued in 1978 and 1982.

WBEC paid the assessments, under protest, with funds provided by the U.S., pursuant to their contract. A[f]ter each payment, WBEC, under the direction of the United States, pursued administrative claims through California Board of Equalization to obtain a refund of the taxes paid. After each administrative claim was denied, WBEC filed suit in state court. Both state court actions were dismissed, without prejudice, in January, 1988, when WBEC and California stipulated to a $3 million refund, based on erroneous assessments against personal property purchased by WBEC and used or installed by government personnel. The remaining $11 million represents the taxes assessed on personal property installed by subcontractors managed by WBEC.

In May, 1988, the U.S. filed suit in district court seeking declaratory relief establishing that California had erroneously classified and taxed WBEC as a construction contractor, as defined in California Sales

and Use Tax Reg. 1521, and that the taxed property was exempt. The United States sought a refund of the $11 million remaining, plus interest. Later, the United States argued that it was entitled to restitution based on a quasi-contract theory under federal common law. Finding that WBEC's failure to comply with California's statutory claim procedure precluded a cause of action for a tax refund, the district court granted California's motion for summary judgment in April, 1989.

The question is whether the district court erred in refusing to consider the quasi-contract claim, and in holding that, in this case, only California law provides a remedy for the over payment of California sales and use taxes.

STANDARD OF REVIEW

The standard of review for a grant of summary judgment is *de novo*. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338 (9th Cir. 1989).

SOVEREIGN IMMUNITY

Although an appellate court normally addresses only those issues resolved below, the court may, in its discretion, review an issue "conceded or neglected below if the issue is purely one of law and the pertinent record has been fully developed, . . . [or] when there are significant questions of general impact." *In Re Howell*, 731 F.2d 624, 626-27 (9th Cir.), *cert. denied*, 469 U.S. 933, 105 S. Ct. 330, 83 L. Ed. 2d 266 (1984) (citations omitted). Since issues of sovereign immunity pervade this case, we address them here.

The United States claims a right to a refund based on California's erroneous interpretations of its tax

laws. Other than asserting in its complaint that the action was brought "to vindicate the sovereign rights and pecuniary interests of the United States," the United States does not rely on any theories of sovereign immunity from the tax in question. Rather, the United States claims that, given the nature and terms of the contract, and WBEC's duties and responsibilities under it, California tax laws simply do not apply to WBEC. The United States does not claim that the tax in question is unconstitutionally discriminatory, or even unconstitutional as applied to WBEC. As the district court stated in its order granting summary judgment, the United States "does not raise a constitutional claim, and, other than its assertion that it brings this suit as a claim under federal common law, it does not tender any federal question."

However, the U.S. alludes to sovereign immunity in its arguments on appeal. Without actually invoking the phrase "sovereign immunity," and relying upon *United States v. Independent School District No. 1*, 209 F.2d 578 (10th Cir. 1954), the United States argues that when the federal government disburses funds, it is exercising a constitutional function, and that the right of the United States to a refund of an erroneous or illegal tax depends on its right to function free from improper state interference.

The Supreme Court has addressed the potential sovereign immunity issue raised by this case, and concluded that "the limits on the immunity doctrine are . . . as significant as the rule itself." *United States v. New Mexico*, 455 U.S. 720, 734, 102 S. Ct. 1373, 1382, 71 L. Ed. 2d 580, 591 (1981). In *New Mexico*, the Court held that state sales and use taxes could be constitutionally applied to federal management contractors. Such a tax is constitutional as long

as it is not imposed directly on the United States, or on a constituent part or instrumentality of the United States. *New Mexico*, 455 U.S. at 735, 102 S. Ct. at 1383, 71 L.Ed. 2d at 592. The Court found that the contractors in *New Mexico* were independent, and not constituent parts or instrumentalities of the United States. *New Mexico*, 455 U.S. at 738, 102 S. Ct. 1385, 71 L. Ed. 2d at 594.

Noting that it was "constitutionally irrelevant" that the United States reimbursed the contractor's expenditures, including tax liabilities, or that title to goods purchased by the contractors passed immediately to the United States, the *New Mexico* Court held that:

> [I]mmunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government. And where a use tax is involved, immunity cannot be conferred simply because the State is levying the tax on the use of federal property in private hands, even if the private entity is using the Government property to provide the United States with goods, or services. In such a situation the contractor's use of the property "in connection with commercial activities carried on for profit," is "a separate and distinct taxable activity." [I]mmunity cannot be conferred simply because the tax is paid with Government funds, [where] the contractor made expenditures under an advanced funding arrangement similiar to the one involved here.

New Mexico, 455 U.S. at 734-35, 102 S. Ct. at 1382-83, 71 L. Ed. 2d at 592 (citations omitted).

The contractual relationship between WBEC and the United States was, in essential respects, the same as the contractual relationships in *New Mexico*. WBEC functioned as an independent contractor operating and managing a federal facility under an advanced funding arrangement. Title to all its purchases immediately passed to the United States. The United States's efforts to characterize WBEC's role and responsibilities as limited do not make WBEC any more a constituent part or instrumentality of the United States than were the contractors in *New Mexico*. *See New Mexico*, 455 U.S. at 736-37, 102 S. Ct. at 1383-84, 71 L. Ed. 2d at 593-94. Moreover, we have previously found Cal. Rev. and T. Code § 6384 and Reg. 1521, as applied to a federal contractor, to be constitutional. *In re Howell*, 731 F.2d at 629. Therefore, the sovereign immunity of the United States from direct state taxation does not extend to WBEC and cannot be invoked by the United States in this case.

FEDERAL OR STATE LAW?

Lacking a colorable constitutional challenge, the United States must find a cause of action elsewhere, *i.e.*, California law or, as the United States argues, federal common law. The issue of whether state or federal law governs is a question of law and is reviewable do novo. *Cortese v. United States*, 782 F.2d 845, 849 (9th Cir. 1986). Precedent in the Ninth Circuit requires justification for the initial choice of federal law or state law in cases where no clear body of federal common law applies. *United States v. State of California*, 655 F.2d 914 (9th Cir. 1980).

Where there is no clear body of applicable federal common law, state law must be applied unless a "sig-

nificant conflict between some federal policy or interest and the use of state law in the premises" is demonstrated. *State of California*, 655 F.2d at 917, quoting *Wallis*, 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L. Ed. 2d 369, 373 (1966). As discussed above, the United States enjoys no sovereign immunity in this case. Thus, the preliminary issues to be resolved in this case are constitutional: 1) whether there exists a federal interest in controlling the applicable law; 2) whether that federal interest conflicts with the state interest in preserving its control over local concerns; and 3); and whether the state law is hostile to a federal program. *See Industrial Indemnity Insurance Co. v. United States*, 757 F.2d 982, 985 (9th Cir. 1985).

A. No federal interest or program

In this case, no federal interest or program has been identified. However, relying upon *United States v. Independent School District No. 1*, 209 F.2d 578 (10th Cir. 1954), the United States argues that when the federal government disburse funds, it is exercising a constitutional function. However, *Independent School District No. 1* is distinguishable. In *Independent School District No. 1*, the United States brought an action to recover overpayments made to the Oklahoma School District under a community school lunch program. The Tenth Circuit reversed a district court judgment for defendants, holding that the federal government was entitled to recover the overpayments regardless of state procedural requirements. In the case at bar, the United States apparently implies that a federal interest is involved whenever the federal government disburses funds. However, it was undisputed in *Independent School District No. 1* that the

federal government had disbursed the funds for the school lunch program in its exercise of constitutional functions or powers. *See Independent School District No. 1*, 209 F.2d at 580. Because the school lunch program was a federal program, the disbursement was made "under the authority of federal law," and the United States had an interest in the success of that program that conflicted with the use of Oklahoma's law.

The present case involves no similar federal program, interest, or policy. It does not follow that every time the federal government disburses funds it does so under authority of federal law. The appellant confuses the act of disbursement with the underlying authority for the disbursement. The mere act of disbursing federal funds does not rise to the level of a federal interest. Here, the United States was not acting "under the authority of federal law" nor "in the exercise of a constitutional function," but instead was compelled by California law to disburse funds to pay state taxes. Since no federal program is involved, and since the disbursement of funds does not automatically give rise to a federal interest, there is no federal interest to conflict with the use of state law. *See United States v. State of California*, 655 F.2d 914 (9th Cir. 1980).

B. No applicable federal common law

The next issue is whether there is a clear body of applicable federal common law. The law which the United States seeks to have applied to this case—a federal common law quasi-contrast theory action for money had and received—is not clear.

Unjust enrichment

The cases cited by the United States to support its argument that it may maintain a quasi-contract action independent of state law involved classic cases of unjust enrichment. *See, e.g., United States v. Limbs*, 524 F.2d 799, 801 (9th Cir. 1975) (refund sought for portion of federal workman's compensation benefits paid for which defendant had received double recovery); *United States v. DeKalb County*, 729 F.2d 738, 740 (11th Cir. 1984) (U.S. mistakenly paid double assessments on the same property); *City of New Orleans v. United States*, 371 F.2d 21, 29 (5th Cir.), *cert. denied*, 387 U.S. 944, 87 S. Ct. 2076, 18 L. Ed. 2d 1330, *reh. denied*, 389 U.S. 890, 88 S. Ct. 19, 19 L. Ed. 2d 201 (1967) (state law manipulation amounting to a "procedural trap" resulted in deprivation of a chance for the federal government to pursue it remedies before state time limitations had run.)

At the heart of an action based on quasi-contract lies a claim of unjust enrichment and such quasi-contract liability is dictated by the needs of justice and fairness. *United States v. Neidorf*, 522 F.2d 916, 918-19 and n.5 (9th Cir. 1975), *cert. denied. Neidorf v. United States*, 423 U.S. 1087, 96 S. Ct. 878, 47 L. Ed. 2d 97 (1976); *see also United States v. Limbs*, 524 F.2d at 801. No such facts exist in this case.

WBEC, backed throughout by the United States, had a fair chance to argue against the validity of the assessments in the adminstrative and state court proceedings. This case does not involve classic unjust enrichment such as simple overpayment. Instead, the United States's unjust enrichment argument is posited upon the interpretation of a state-created exemption from a state created sales tax. Thus, as will be discussed below, compliance with state law claim filing

procedures is a condition precedent to the filing of an action. Moreover, the United States's federal common law argument is undermined by the fact that the United States seeks declaratory relief based entirely on the interpretation of California tax regulations. The district court did not err in denying equitable relief when it found that the facts of this case "simply do not give rise to a claim of 'unjust enrichment' sufficient to invoke the doctrine of quasi-contract." Record at 23.

C. 28 U.S.C. § 2415 and the quasi-contract claim

Initially, the United States brought this action for declaratory relief, essentially, for a refund of monies paid to WBEC for the tax assessment. At a certain point after the commencement of the litigation, the United States changed its argument to a claim for a refund based on quasi-contract. This quasi-contract theory would allow the United States to take advantage of a six-year statute of limitations under 28 U.S.C. § 2415.

However, 28 U.S.C. § 2415 does not permit the United States to bring a quasi-contract claim because section 2415 does not provide a cause of action. It merely provides for a six year time period during which the United States *may* sue under quasi-contract. We have held that the United States is not subject to state statutes of limitations when it seeks to assert an *otherwise valid* cause of action, the United States "must have become entitled to a claim and have acquired a cause of action before it comes under the umbrella of 28 U.S.C. § 2415." *United States v. Hartford Accident and Indemnity Co.*, 460 F.2d 17, 19 (9th Cir.), *cert. denied* 409 U.S. 979, 93 S. Ct. 308, 34 L. Ed 243 (1972) (failure to bring suit within California statutory time limit vitiated claim). Because of its failure to comply with California's claim filing requirements, the United States has not become entitled to a claim. Thus, section 2415 does not apply.

The United States points out that the Supremacy Clause and policies protecting the federal treasury provide the United States with litigation advantages over other plaintiffs in enforcing its rights, such as freedom from state statutes of limitations and from the defense of laches. Although sovereign immunity normally exempts the United States from state statutes of limitations, *United States v. John Hancock Mutual Ins. Co.*, 364 U.S. 301, 308, 81 S. Ct. 1, 5 L. Ed. 2d 1 (1960), when a claim procedure is a condition precedent to, or an integral element of a state-created cause of action, the United States is not exempt from the time bar, even if a federal statute of limitations may otherwise apply. *State of California*, 655 F.2d 914, 918 (9th Cir. 1980).

In the case at bar, the district court correctly found that the United States had no cause of action for a tax refund since it lacked an element necessary to the accrual of the cause—the United States failed to file suit within 90 days of the Board of Equalization's denial of WBEC's refund claim, as required by Cal. Rev. & T. Code § 6933. Although WBEC *did* file state court actions within 90 days of each adverse decision by the Board of Equalization, those actions were later dismissed without prejudice, the legal effect of such dismissal is as though the actions had never been filed. *See Nolan v. Workers' Compensation Appeals Board*, 70 Cal. App. 3d 122, 128-29, 138 Cal. Rptr. 561, 564 (1977). We have, previously, recognized the effect of a dismissal without prejudice. *See Humphreys v. United States*, 272 F.2d 411 (9th Cir.

1959) (after widow voluntarily dismissed without prejudice, a Federal Tort Claims Act suit was brought on account of husband's death, and widow was denied reinstatement because statute of limitations had, by then, run). Thus, the 90-day periods following each administrative denial *effectively* ran without suit being filed, precluding a state cause of action for a refund.

Although California courts have not characterized the 90-day limit of section 6933 as a condition precedent to the accrual of a cause of action, the failure to comply with the 90-day limit has been held to bar suit. *Pacific Gas & Electric v. State Board of Equalization*, 134 Cal. App. 2d 149, 285 P.2d 305 (1955), *app. dismissed*, 350 U.S. 979, 76 S. Ct. 468, 100 L. Ed. 848 (1956). Moreover, California courts have held similar limitations to be conditions precedent to, or essential elements of, other causes of action. *See State of California*, 655 F.2d at 918, *United States v. Hartford Accident and Indemnity Co.*, 460 F.2d at 19. Since federal statutes of limitations become determinative only after the government acquires a cause of action, and since the United States never acquired a cause of action, 28 U.S.C. § 2415 does not apply. *See State of California*, 655 F.2d 914 (9th Cir. 1980). Thus, the precedent relied on by the district court amply supports its ruling that compliance with the 90-day limit is an element of the cause of action for a tax refund. *State of California*, 655 F.2d at 918-19.

Recently, in a case that is factually similar to the case at bar, the Eleventh Circuit reversed a summary judgment in favor of Broward County and held that the United States's claim for a refund of tax payments sounded in quasi-contract. *United States v. Broward County*, 901 F.2d 1005 (11th Cir. 1990).

The Eleventh Circuit held that the United States was not subject to the Florida 60-day claim filing deadline in spite of the fact that the Florida statute also created the right to contest the assessment. Argument to the contrary "presupposes that the United States must look to the state law for the creation of its cause of action. The cause of action asserted by the federal government is not a state law judicial remedy or cause of action but is a federal common law cause of action in quasi-contract for money had and received. In these circumstances the state statute has no application to this action." *Broward County*, 901 F.2d at 1008-9.

The Eleventh Circuit gave no reason for its conclusion and attempted to disinguish *State of California*, on the ground that *State of California* involved a state cause of action rather than the federal quasi-contract cause of action. The only federal common law relied upon by the Eleventh Circuit was the common law action for money had and received. As discussed above, the common law action for money had and received is not applicable in this case. Just as there was no unjust enrichment in *State of California*, there was none in *Broward County*, and there is none in the case at bar.

Furthermore, compliance with state claim filing procedures was a condition precedent to the filing of a court action in *State of California*. The Ninth Circuit found that the use of California's claim filing law would not infringe upon any federal interest and rejected the federal government's arguments that unique federal interests were indicated in 28 U.S.C. § 2415(b), the federal statute of limitations. "We find no indication in the legislative history of that statute . . . *of any federal policy or program* which

would be frustrated by requiring compliance with California's more restrictive time requirements." *State of California*, 655 F.2d at 919 (emphasis added). The same condition precedent was present in *Broward County*. However, the Eleventh Circuit chose not to apply state law without explanation.

An analysis of *Broward County* under the Ninth Circuit's approach would have yielded a different holding. There was no conflict between any federal interest and the use of state law. The federal government had no interest, program, or policy that would have been compromised or frustrated by the use of Florida's claim filing procedure. Furthermore, the law suit filing deadline would have created no difficulty for the federal government beyond encouraging efficiency and speed in the preparation of claims and litigation. *See State of California*. Had the Eleventh Circuit applied the Ninth Circuit's approach in *Broward County*, the Florida statute would have been applied.

D. CONCLUSION

The United States's allusions to sovereign immunity are unfounded, and no federal interests or programs have been identified that would conflict with the use of California's tax laws. Furthermore, there has been no showing of classic unjust enrichment that would justify the use of a federal common law claim for money had and received. The United States does not claim, and the district court did not find, any unfairness in the state administrative or judicial proceedings. Since there is no applicable federal common law and no conflict between federal policy and the use of the California tax law in this case, state law must be applied. As in *State of California*, the

United States has failed to meet the claim filing requirements and, therefore, has not stated a cause of action.

This case comes down to a tactical mistake. In directing WBEC to accept the settlement and dismiss the action without prejudice, the United States apparenty did not appreciate fully the implications of its actions under California's statutory tax refund claim procedures. However, this mistake does not, of itself, warrant equitable relief. The United States had its day in court. Equity does not now demand that the United States be given a second opportunity to prove that the tax assessment was erroneous.

We affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIV. S-88-600 LKK/EM

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA; AND CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS

ORDER

[Filed Apr. 25, 1989]

The United States brings this suit for declaratory judgment and refund of taxes. At issue is $14,136,853.43 in sales and use tax paid to the state prior to 1982 by the United States for its contractor, Williams Brothers Engineering Company (WBEC). The Government claims that state law did not authorize collection of these taxes because WBEC was not contractually responsible for the installation of the property it purchased, and thus was not a construction contractor as defined by Cal. Sales and Use Tax Reg. 1521(a)(2). Given this claim, the Government argues that the property was merely for resale and not subject to sales tax. Alternatively, plaintiff argues that many of the purchases were exempt because they were not fixtures, which, under Cal. Reg. 1521(b) are nontaxable sales for resale.

Plaintiff does not raise a constitutional claim, and other than its assertion that it brings this suit as a claim under federal common law, it does not tender any federal question.

Both parties have moved for summary judgment. Defendants submit, in part, that this action is time-barred. Because I believe that defendants' position is dispositive, I turn to the question of whether this suit is timely brought.

Because of sovereign immunity principles, the United States is generally not subject to statutes of limitation. *See United States v. John Hancock Mutual Insurance Co.*, 364 U.S. 301, 308 (1960). There are two exceptions. First, a state-created cause of action which integrates a claim procedure can time-bar the federal government. *United States v. State of California*, 655 F.2d 914 (9th Cir. 1980). Second, Congress may expressly limit the federal government's time to file suit, or it may waive federal immunity to state statutes of limitation. As I explain below, it appears to the court that the first exception applies to the matter at bar.

The Ninth Circuit has held that a California statute "which provides a time limitation as an element of a cause of action or as a condition precedent to libility applies to suits by the United States even if there is an otherwise applicable federal statute of limitations." *Id.* at 918-19, *citing Willis v. Reddin*, 418 F.2d 702, 704 (1969). ("In California statutes or ordinances which condition the right to sue the sovereign upon timely filing of claims and actions are more than procedural requirements. They are elements of the plaintiff's cause of action and conditions precedent to the maintenance of the action.") The court explained that although the United States may sue the state in federal court

> [L]ike any other plaintiff, the federal government must first have a cause of action against the state. [California's claim filing] requirements are substantive elements of the cause of action, not mere jurisdictional limitations. . . .
>
> The federal government, like any other plaintiff, must meet all elements of any applicable cause of action—the bitter as well as the sweet.

655 F.2d at 918-19. *See also United States v. Hartford Accident and Indemnity Co.*, 460 F.2d 17, 19 (9th Cir. 1972).

In *United States v. California* the court found that California had integrated its claim-filing provisions into the statutory right to recover against the state. Because the United States had not complied with the state's claim-filing provisions, it was time-barred from filing suit.[1] As I now explain, these principles apply directly to the suit before the court.

By statute, California has provided a right to seek tax refunds contingent on a claim procedure. Cal. Rev. and Tax. Code § 6901 provides a right for refund for sales taxes improperly collected. Section 6902 provides that no refund shall be approved by the board unless a claim is timely filed. Sections 6932 and 6933 allow suit to be brought only after an administrative claim is denied.[2] Section 6933 provides:

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[1] *Compare United States v. Limbs*, 524 F.2d 799 (9th Cir. 1975) (six-year federal limitations period applies where restitution sought on federal grounds with no applicable state statute).

[2] Although the state statute permits suit in state court, its provisions cannot bar the United States from suing for a refund in federal court. *See United States v. California*, 655 F.2d at 918-19.

> Within 90 days after the mailing of the board's action upon a claim filed pursuant to Article 1 (commencing with Section 6901), the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in any city or city and county of this state in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> *Failure to bring action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.*

Cal. Rev. and Tax. Code § 6933 (emphasis added).

There can be no doubt that, pursuant to this statutory scheme, the timely filing of a state court action is a condition precedent to liability. In other words, there is no such thing as a right to refund unless refund procedures are followed.[3]

It is undisputed that WBEC, at plaintiff's direction, filed a timely claim and then a timely lawsuit. It is also undisputed that, having won a partial settlement, WBEC voluntarily dismissed the state court action without prejudice. When an action is dismissed without prejudice, it is as though it were never filed. *See* Witkin, *California Procedure*, Volume 6, § 81. The 90 days in which to file suit have long since passed. Thus, pursuant to state law and applying the prin-

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[3] For this reason, plaintiff's argument that it brings this action under principles of federal common law cannot be entertained. Given this observation, the court will resist the temptation to examine the complex issues relating to whether notions of federal common law would otherwise apply under the circumstances of this case.

ciples of *U.S. v. California, supra,* plaintiff has waived its demand for overpayment.

Plaintiff argues that 28 U.S.C. § 2415(a) applies to the instant case. This argument must be rejected. As I noted above, where a state claim statute applies as an element of a cause of action, it applies to suits of the United States "even if there is an otherwise applicable federal statute of limitations." *U.S. v. California*, 655 F.2d at 918-19. Indeed, plaintiff's argument is no more than an assertion that although it relies on California's substantive law, its claim is founded on principles of federal common law. Since, as I have explained above, no claim exists unless founded upon California's statute, the Government's argument must be rejected.

Indeed, even if the Government's argument was tenable, it would not apply under the circumstances of this case. For the federal statute to apply, plaintiff's claim for a tax refund must be characterized as sounding in tort, contract or quasi-contract. *United States v. Limbs*, 524 F.2d 799 (9th Cir. 1975). As I explain below, such a characterization of the instant suit is inappropriate.

In the case at bar, the United States chose to finance its contractor's tax bill. It then directed its contractor through state court litigation which resulted in limited success. It now seeks to utilize a favorable statute of limitations in order to litigate its claim relative to a proper interpretation of state law on its own behalf. As I explain below, these facts simply do not give rise to a claim of "unjust enrichment" sufficient to invoke the doctrine of quasi-contract.

It is true that in another context this circuit's court has noted that the wording of § 2415(a) "'is in-

tended to include quasi-contracts involving unjust enrichment wherein the debtor receives money from the Government to which he is not entitled, regardless of whether the payment is made pursuant to agreement or as a gratuity.'" *Limbs* at 803 n.3, *quoting Hearings on H.R. 13652 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 7 (1966). This broad restatement of the definition of quasi-contract does not resolve the question of whether the definition of "quasi-contract" can be stretched to include state taxes under a disputed state statute. Again, I note that plaintiff argues that defendant is not entitled to the money because, under state law, plaintiff deserves a refund. Thus, the claimed entitlement depends on an interpretation of state law. Under such circumstances, there is simply no "unjust enrichment" within the traditional meaning of the phrase, such as existed in *Limbs* itself, where a plaintiff receives double recovery.

While the Ninth Circuit has not addressed the issue, several other circuits have held, under a variety of circumstances, that the federal government's claim for a state tax refund sounds in quasi-contract. *United States v. Michigan*, 851 F.2d 803 (6th Cir. 1988); *United States v. DeKalb County*, 729 F.2d 738 (11th Cir. 1984); *City of New Orleans v. United States*, 371 F.2d 21, 23 (5th Cir. 1967); *U.S. v. Compagnie Generale Transatlantique*, 26 F.2d 195 (2d Cir. 1928). Although those courts have found a quasi-contractual right to a refund when the United States is a plaintiff, that characterization is not made when individual citizens sue. *See Shelter Island and Greenport Ferry Co. v. United States*, 246 F. Supp. 488 (E.D. N.Y. 1965); *Sea Products, Inc. v. United States*, 578 F. Supp. 1485 (W.D. Wash. 1983).

The Ninth Circuit has observed that the federal statute of limitations was enacted in "order to place actions by the United States on an equal footing with those by private litigants." *Limbs*, 524 F.2d at 801 (citing legislative history). By characterizing the Government's action as "quasi-contract" under circumstances where a private litigant's action would not be so characterized, the Government achieves an extra three years to file suit. Such a result directly contradicts the Ninth Circuit's interpretation of congressional purpose.

The equities of the instant action, moreover, are considerably less compelling than in those cases in which an action in quasi-contract was allowed. For instance, in *City of New Orleans*, *supra*, the defendants' "sleight of hand" was said to have effectively foreclosed either the subcontractor or the Government from invoking a state claim for refund. The court found that "[a]gainst the inequities of such a procedural trap, we think there is ample power in the United States District Court to protect the sovereign against such unjust enrichment on familiar principles of money had and received." 387 F.2d at 28. There is no suggestion in the record before me that the state administrative or court proceedings were less than fair. Perhaps if state law had been manipulated, as in *New Orleans*, to cheat the Government from a chance of pursuing its remedies, common law notions of "unjust enrichment" might take this case out from under the doctrine of *United States v. California*. Here, however, the Government seeks no more than to relitigate its contractor's entitlement to the "sale for resale" exclusion, *i.e.*, a state-created exemption from a state-created sales tax regulation. Without the exclusion, neither WBEC nor the United States would

have a claim to "unjust enrichment." The alleged "unjustness" would not exist if the state had not created an exception to its tax. There is no alleged unjustness in the state procedures.

In sum, the Ninth Circuit has not characterized tax refund claims as quasi-contractual; it has, however, found California claim procedures similar to those at bar to be integral to a cause of action. Since the Government sues pursuant to California law, its failure to comply with the state procedures bars this claim. Although WBEC filed a timely claim and then a lawsuit, even if this were sufficient to preserve the United States' rights, the dismissal without prejudice rendered that suit null and void. Thus, the 90 days have passed in which either party could file its suit. Accordingly, this suit is time-barred.

In light of the above, IT IS HEREBY ORDERED that defendants' motion for summary judgment is GRANTED and plaintiff's motion for summary judgment is DENIED.

IT IS SO ORDERED.

DATED: April 24, 1989.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-15833

D.C. No. CIV S-88-600-LKK-EM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

STATE OF CALIFORNIA AND CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS-APPELLEES

ORDER

[Filed Mar. 18, 1992]

Before: ALARCON and POOLE, Circuit Judges, and HATTER,* District Judge

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Alarcon and Poole have voted to reject the suggestion for a rehearing en banc. Judge Hatter would so recommend.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Terry J. Hatter, Jr., United States District Judge for the Central District of California, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-15833

CT/AG#: CV-88-0600-LKK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

STATE OF CALIFORNIA; CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Eastern District of California (Sacramento)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 5/16/91.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case Number: CIV S 88-600 LKK

UNITED STATES OF AMERICA

v.

STATE OF CALIFORNIA, ET AL.

Judgment in a Civil Case

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

JUDGMENT IS HEREBY ENTERED PURSUANT TO THE COURT'S ORDER OF 4-25-89, GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

ACCORDINGLY, THIS ACTION IS ADMINISTRATIVELY CLOSED.

[Entered 4-25-89]

Date April 25, 1989

JAMES R. GRINDSTAFF
Clerk

/s/ C. A. Ward
(By) Deputy Clerk

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Supreme Court, U.S.
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No. 91-2003

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF CALIFORNIA and CALIFORNIA STATE BOARD OF EQUALIZATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of the State of California

LAWRENCE K. KEETHE
Supervising Deputy Attorney General

ROBERT D. MILAM
Counsel of Record
Deputy Attorney General

P.O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 324-5156

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the United States has a cause of action against the State of California for recovery of taxes when there is no allegation of unconstitutional state taxation, when the tax was admittedly upon a federal contractor, when the tax was paid by the federal contractor and was reimbursed by the United States to the federal contractor, and when the federal contractor's remedies have been barred by the statute of limitations under the law of the State of California?

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No. 91-2003

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF CALIFORNIA and CALIFORNIA STATE BOARD OF EQUALIZATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ERRORS AND OMISSIONS ON THE STATEMENT OF THE CASE

1. The statement by the United States goes beyond any facts needed to make its argument on the one issue before this Court. Some of the statement by the United States consists of argument on the meaning of the contract between the United States and Williams Bros. Engineering Co. (hereafter "WBEC") and characterization of the contract terms. The respondents agree with the factual statements in the United States' statement, but disagree with the United States' characterization of the terms of the contract. However, since the interpretation of

the contract is not before this Court, respondents will not present their contrary interpretation of the meaning of the contract.

2. In its discussion of the state court proceedings, the United States asserts that the United States was not joined as a party in the action. While this is true, the facts below made it clear that the United States directed and controlled the state court action. (See appendix to the United States' petition, pages 9a and 15a.)

3. While WBEC timely filed the state court actions, which were ultimately dismissed without prejudice in 1988, sections 6932, 6933, 6902, and 6905 of the California Revenue and Taxation Code prohibited any actions after June 2, 1985. This statute of limitations would have barred WBEC from filing another suit at the time the United States filed this action and it also bars the United States from doing so. The fact that a case may be dismissed without prejudice does not extend the statute of limitations and, thus, when the statute of limitations runs before another suit is filed, no suit may be filed. A court has no jurisdiction to hear a case which was filed after the statute of limitations runs, even if that suit was previously dismissed without prejudice.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE LEGAL RELATIONSHIP OF THE PARTIES REQUIRES DENIAL OF THE PETITION

The one fact that makes this case different from all of the cases relied upon by the United States is the lack of any allegation by the United States that it was being

unconstitutionally taxed by the State of California. This fact is significant because, in the absence of such allegation, an analysis of the legal relationship of the parties must consider the tripartite nature of the relationship between WBEC, the United States, and the State of California. Lacking any allegation that the State of California was unconstitutionally taxing the United States, the United States can claim no independent standing to sue respondents. The only rights that the United States can claim are derivative of its contractual relationship with WBEC. Because the incidence of the tax is not upon the United States, *Alabama* v. *King & Boozer*, 314 U.S. 1, 8-9 (1941); *United States* v. *California State Bd., etc.*, 683 F.2d 316, 318 (9th Cir. 1982), the taxpayer in this case is WBEC. WBEC, in fact, paid the taxes to the State of California. The United States' failure to allege unconstitutional taxation by the state, requires this Court to rely only upon the tripartite relationship between the United States and WBEC and WBEC and the State of California to find a cause of action.

Assume, for example, that the contract between the United States and WBEC required WBEC to pay state taxes without any reimbursement from the United States. Would the United States then have an action against the State of California if there were no allegations of unconstitutional taxation upon the United States? The answer is obviously no. Under that scenario, if the State of California overtaxed WBEC, the United States could not state a claim against the State of California.

Underlying the United States' petition is the fundamentally-flawed premise that the agreement whereby the United States reimburses WBEC for taxes paid to the State of California gives the United States a cause of

action against the State of California. Yet, the United States does not cite one case that supports this premise. The only legal rationale that can be developed from the scenario where the United States reimburses WBEC for payment of state taxes is that if WBEC paid too much and is due a refund, that refund should go to the United States under principles of equity. The most accurate description of the right created by the reimbursement provision of the contract between the United States and WBEC is that it causes an equitable assignment of WBEC's cause of action against the State of California. This describes the legal concept of subrogation. *Allianz Insurance Co.* v. *Municipal Court*, 126 Cal.App.3d 1043, 1046; App., 179 Cal.Rptr. 334, 335 (1981); *Royal Indem. Co.* v. *Security Truck Lines*, 212 Cal.App.2d 61, 64, 27 Cal.Rptr. 858, 860 (1963).

Thus, the only common law principle underlying this action is not, as the United States argues, "money had and received" (indebitatus assumpsit), but the principle of subrogation. Subrogation can be of two kinds, legal and contractual, *Fifield Manor* v. *Finston*, 54 Cal.2d 632, 638, 354 P.2d 1073, 1076, 7 Cal.Rptr. 377, 380 (1961), and the rights accruing to a subrogee do not differ whether a party is subrogated under equitable principles or under contract. *Snider* v. *Basinger*, 61 Cal.App.3d 819, 824, App., 132 Cal.Rptr 637, 639-640 (1976). The primary rule in subrogation is that the subrogee takes no greater rights or remedies than the subrogor. *Liberty Mut. Ins. Co.* v. *Fales*, 8 Cal.3d 712, 717, 505 P.2d 213, Sup., 106 Cal.Rptr. 21, 24 (1973); *March* v. *Barnet*, 121 Cal. 419, 53 P. 933, 934 (1898); *Randall* v. *Duff*, 107 Cal. 33, 35, 40 P. 20 (1895); *Redington* v. *Cornwell*, 90 Cal. 49, 58, 27 P. 40, 42 (1891); *Iusi* v. *City Title*

Ins. Co., 213 Cal.App.2d 582, 588, 28 Cal.Rptr. 893, 897 (1963). If the subrogor has no remedies, the subrogee has no remedies. *Commercial Union Assurance Co.* v. *City of San Jose*, 127 Cal.App.3d 730, 734, 179 Cal.Rptr. 814, 816-817 (1982).

Under this common law principle, the United States, as the subrogee of WBEC's claim against the state, has no claim against the State of California because WBEC had no valid claim against the state when the United States filed suit in this action. Under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78 (1937), a federal court sitting in diversity is obligated to apply the substantive law of the state. *United States* v. *Anderson County, Tenn.*, 761 F.2d 1169, 1173 (6th Cir. 1985), *cert. denied*, 474 U.S. 919 (1985).

II.

INDEBITATUS ASSUMPSIT CANNOT BE THE BASIS FOR THE UNITED STATES' CAUSE OF ACTION

Prior to the time that statutory remedies were made available to taxpayers in seeking to recover overpaid taxes, the common law doctrine of indebitatus assumpsit was the source of the taxpayers' right to recover any money.[1] The United States' reliance on this common law

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[1] In the older cases cited by the United States in its petition, it is clear that a taxpayer could recover only when the payment was involuntarily made and a protest was made prior to a collector's act of turning the money over to the government. If the payment was made voluntarily and the money was turned over to the government without protest, there could be no

principle, however, is misplaced. The cases cited by the United States in its petition each involves a suit between the taxpayer and the taxing authority. In other words, the taxpayer who paid the tax sued the entity having wrongful possession of money belonging to the taxpayer. In this case, however, the United States paid no taxes to the State of California and was not a taxpayer under either state or federal law. The common law action based on money had and received is an action whereby one party is indebted to the other party in some legal or equitable way. The United States, as stated above, would have an argument if the issue of unconstitutional state taxation was present in this case. Lacking that issue, however, the only party that may be said to be indebted to the United States is WBEC, and this indebtedness arises out of the contract between the United States and WBEC.

In its petition for a writ of certiorari, the United States does not explain how it has a cause of action for unjust enrichment by the State of California directly at the expense of the United States. In footnote 3 the United States states that " . . . It is sufficient for the plaintiff to show that money equitably belongs to him, even if it was paid to the defendant by another." The cases cited in that footnote, however, do not support the United States' virtually unlimited application of the rules concerning the action of money had and received. In *Bayne, et al. Trustees* v. *United States*, 93 U.S. 642 (1876), there was a criminal misappropriation of United States funds by Paulding and

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recovery even if the taxes were overpaid. *William B. Bend* v. *Jesse Hoyt*, 38 U.S. (13 Pet.) 263, 267 (1839).

Bayne. This Court held that an action in assumpsit will lie whenever the defendant has received money *which is the property* of the plaintiff. In the case at bar it was WBEC's money, not the United States' money, that was paid to the Board of Equalization. The fact that the United States had a contractual obligation to reimburse WBEC for taxes paid to the state does not convert those funds received by the state into property owned by the government. The distinction between *Bayne* and the case at bar is that in *Bayne* the United States had an undisputed right to the property, and in this case it does not.

Gaines v. *Miller*, 111 U.S. 395 (1884) also cited by the United States does not support its position. In that case, Gaines was the daughter of one Daniel Clark, but she did not find out she was Clark's daughter until many years later. Clark had executed an 1811 will, but just before he died in 1813 he lawfully executed a new will leaving everything to his daughter and revoking the 1811 will. However, the executors under the 1811 will began to administer Clark's estate illegally. The executors appointed an agent to sell some of Clark's property and the agent sold the property but did not turn over the money to the executors and in 1815 absconded with the money. The executors then received a judgment in 1819 against the agent, Hammond. Miller was the administrator of Hammond's estate and Gaines, having learned that she was Clark's daughter, sued the estate. This Court held that Hammond had money that belonged to Gaines and

thus Gaines had an action in assumpsit.[2] The action at bar is different, however, because if there is any right to recover money from the State of California, it is WBEC's and not the United States'. The United States would have a suit for money had and received only against WBEC if WBEC were to recover money from the state. These two cases relied upon by the United States show clearly that no action for money had and received lies in this action.

The third case cited by the United States in footnote 3 of its petition is different from the other two, but it states the same principles. This Court in *Galante* v. *Commodity Credit Corporation*, 71 F.Supp. 963 (S.D. Calif. 1947) held that assumpsit will lie whenever the defendant has received money *which is the property* of the plaintiff. As stated above, the State of California received money belonging to WBEC and not the United States. The fact that the United States agreed to reimburse WBEC does not convert these funds into property of the United States. The United States has never shown, and cannot show, that the money paid by WBEC to the State of California belongs to the United States.

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[2] However, the delay in discovering that Gaines was Clark's daughter was ultimately fatal to the action because the court held Gaines could not recover under a Missouri statute that conclusively presumed satisfaction of a judgment after 20 years.

In looking at the case at bar, any analysis must consider the tripartite relationship between WBEC, the United States, and the State of California. WBEC paid the taxes to the state, filed petitions for redetermination, filed claims for refund, and filed a state court lawsuit. It is only because of the United States' contractual agreement to reimburse WBEC for the amount of state taxes paid, that the United States has any interest in the taxes paid by WBEC. If there is any indebtedness which can form the basis for an action based upon money had and received, it is the direct indebtedness that WBEC would owe to the United States if any taxes were recovered. The United States, however, has no independent right of action against the State of California.

A cause of action for money had and received lies when there is unconstitutional taxation of the United States.[3] *United States* v. *Michigan*, 851 F.2d 803 (6th Cir. 1988) [federal credit unions were a constituent part of the United States, and therefore exempt]; *United States* v. *City of Manassas, VA.*, 830 F.2d 530 (4th Cir. 1987) [tax is discriminatory because it discriminated against contractors of the United States]; *United States* v. *Dekalb County*, 729 F.2d 738 (11th Cir. 1984) [United States mistakenly paid double assessments on the same property]; *City of New Orleans* v. *United States*, 371 F.2d 21 (5th Cir. 1967), *cert. denied*, 382 U.S. 944, *reh'g. denied*, 389 U.S. 890 (1967) [state law manipulation amounting to a "procedural trap"

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[3] Unconstitutional taxation by a state is limited to: (1) tax on a contractor who is a constituent part, or an arm, of the government; (2) a tax which discriminates against the federal government; and (3) a tax which substantially interferes with the activities of the United States. *United States* v. *New Mexico*, 455 U.S. 720, 735, n. 11 (1982).

resulted in deprivation of a chance for the federal government to pursue its remedies before the state time limit had run]. In *City of New Orleans*, there had been prior state court proceedings. In those proceedings United States ownership had been established by an adjudication on the merits and was held to be binding on the city as a party in privity. It was this adjudication that raised the sovereign immunity issue that is absent in this case.

A variation on this theme of unconstitutional taxation is illustrated by the case of *United States* v. *Broward County, Fla.*, 901 F.2d 1005 (11th Cir. 1990). In that case, federal statutes authorized the local taxation of an interest in real property acquired by the United States under the Public Buildings Program. The county taxed the interest of the United States from 1979 to 1985 at values ranging from $10.8 million to $17.6 million. The United States paid its taxes under protest arguing that the county officials had improperly valued the property under state law. The United States asserted a value of $7.4 million as of 1981 and that, with appropriate adjustments, this should be the value of the federal taxable, interest. The *Broward County* case is much different than the case at bar because the United States' property was taxable and the United States was the taxpayer, and thus the United States had a primary right to assert improper taxation and to sue under money had and received. The case at bar is different, as stated above, because here the tax is not on the United States nor is the United States the taxpayer.

While an action for money had and received lies when there is unconstitutional state taxation of the United States, it does not lie when the United States

merely reimburses a federal contractor. The reimbursement does not convert a potential action by WBEC against the state into an independent action by the United States against the State of California. Because the United States' claim is based solely upon the rights it derived from WBEC, it is clear that federal common law cannot be the basis of this action because WBEC could not have proceeded under federal common law.

Indeed, this Court has held that it matters how the United States acquires its cause of action. In *United States* v. *Buford*, 28 U.S. (3 Pet.) 12 (1830), this Court ruled that the transfer of a claim to the United States cannot give it any greater validity than it possessed in the hands of the assignor. The *Buford* court held that when the statute of limitations ran before the assignment, the government took the assignment with that disability. *Id.* at 30. See also *United States* v. *Nashville, Chattanooga & St. Louis Railway Company*, 118 U.S. 120, 125-126 (1886).

In this case the United States acquired its claim from WBEC, a nongovernmental entity. Thus, the United States steps into the shoes of WBEC and is subject to the same disabilities possessed by WBEC when the United States acquired the claim. WBEC could not have prosecuted a refund action when the United States filed this action, and therefore, as in *United States* v. *Buford*, 28 U.S. (3 Pet.) 12, the United States is barred from pursuing this action.

Nor is the United States prejudiced in any way by this result. In its petition, at pages 13 and 14, the United

States speaks of the potential disaster of a federal contractor not diligently asserting its rights thereby foreclosing any United States' action. The problem with that argument in this case is that it is clear, and the Ninth Circuit so held, that the United States controlled and directed WBEC's actions from beginning to end in this case. The United States directed WBEC to appeal to the Board of Equalization; the United States directed WBEC to file the state court actions; the United States controlled the state court actions, including the dismissal. The federal contractor did not sleep on any of the United States' rights in this case.

In addition, the other side of this argument raised by the United States is that there is also a public policy that tax matters be finalized as to the State of California. The United States had one bite of the apple when it directed and controlled WBEC's state court actions and now is in the process of "forum shopping" in order to obtain a second bite. The State of California has a fundamental interest in a tax collection process that is final and complete.

III.

DECISIONS HOLDING THAT STATE STATUTE OF LIMITATIONS CANNOT CIRCUMSCRIBE FEDERAL ACTIONS DO NOT APPLY IN THIS CASE

The United States in its petition for a writ of certiorari tells this Court that there is an absolute and inflexible rule that federal actions can never be subject to a state statute of limitations. In making this argument the United States ignores precedent and converts a complex

set of rules as to how state statutes of limitations apply to federal actions into a one rule serves all purposes approach. The United States is wrong in its approach.

The general rule as to how federal actions are impacted by state statutes of limitations is that if Congress has not acted with respect to a statute of limitations, the state statute of limitations of the forum state is applied. *Runyon* v. *McCrary*, 427 U.S. 160, 180 (1975); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1974); *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, 703 (1965); *O'Sullivan* v. *Felix*, 233 U.S. 318, 322 (1913); *Chattanooga Foundry* v. *Atlanta*, 203 U.S. 390, 397 (1906); *McClaine* v. *Rankin*, 197 U.S. 154, 158 (1904); *Campbell* v. *Havenhill*, 155 U.S. 610 (1894); *M'Clunny* v. *Zillman*, 28 U.S. (3 Pet.) 270, 277 (1830). See also *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 375 (1971) (Rehnquist, J. dissenting in part) [unless the United States is suing in its sovereign capacity, absent any federal statute of limitations, the statute of limitations of the particular state is applicable].

The United States assumes that it has an action for money had and received and that therefore the federal statute of limitations applies. As pointed out above, however, the United States has no action for money had and received. The United States acquired its claim from WBEC and is asserting only state causes of action [interpretation of state statutes and interpretation of state administrative regulation]. It is indisputable that there is no federal statute of limitations on such state causes of action and therefore it follows that the state statute of limitations applies.

The United States' reliance on *United States* v. *Summerlin*, 310 U.S. 414 (1946) is misplaced. In that case, the United States acquired a claim against an estate by virtue of the decedent's actions. The United States did not file its claim within the 8-month period under state law. This Court ruled that a state statute could not invalidate an otherwise *valid* claim. The *Summerlin* court held that a state goes beyond its power when it seeks to invalidate a valid claim by means of a statute of limitations.

The United States cannot fall under this rule because it did not acquire a claim that could have been prosecuted by WBEC. If the statute of limitations ran against the claim before the United States acquired it, the United States is subject to that disability.

As the Ninth Circuit Court of Appeals stated in *United States* v. *Hartford Accident and Indemnity Co.*, 460 F.2d 17 (9th Cir. 1972), *cert. denied*, 409 U.S. 979 (1972):

> " . . . Inherent in the language of the Supreme Court is the requirement that the government must have become entitled to a claim and acquired a cause of action before it comes under the umbrella of 28 U.S.C. § 2415." *Id.* at p. 19.

The Ninth Circuit Court of Appeals was correct in holding that 28 U.S.C. § 2415 does not provide the United States with a cause of action in this case, and before the statute of limitations contained in 28 U.S.C. § 2415 applies the United States must demonstrate it has become entitled to a claim. The United States has failed to demonstrate that essential ingredient. The Ninth Circuit Court of Appeals found no such valid claim and this Court

should deny the petition for a writ of certiorari on the same basis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: August 10, 1992.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the
State of California

LAWRENCE K. KEETHE
Supervising Deputy Attorney
General

ROBERT D. MILAM
Counsel of Record
Deputy Attorney General

Attorneys for Respondents

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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

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REPLY BRIEF FOR THE UNITED STATES

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1. Respondents seek to defend the decision in this case under a theory that was not discussed or adopted by the court of appeals. The court of appeals did not doubt that the United States has standing in its own right to pursue the federal common law cause of action for money had and received to recover taxes unlawfully exacted from federal contractors. Instead, the court held that "compliance with state law claim filing procedures is a condition precedent" (Pet. App. 9a-10a) to recovery under this federal cause of action. The court stated that the requirements of the federal cause of action were not met in this case because available state procedures were not followed by the United States and, as a result, "there has been no showing of classic unjust enrichment that would

justify the use of a federal common law claim for money had and received" (*id.* at 14a).

The court of appeals recognized that its decision in this case conflicts with *United States* v. *Broward County*, 901 F.2d 1005 (1990), in which the Eleventh Circuit applied the established rule that the rights of the United States are not circumscribed or limited by state procedures, state statutes of limitation, or "state notions of laches" (*Board of County Comm'rs* v. *United States*, 308 U.S. 343, 349-351 (1939)). As discussed in the petition (at 8, 10-14), the holding in this case that the United States must comply with the state-law procedures applicable to state tax refund claims as a "condition precedent" (Pet. App. 10a) to invoking federal law to recover unlawfully exacted state taxes also conflicts with decisions of this Court and with decisions of several other courts of appeals.

2. Respondents do not deny that, under its own terms, the decision in this case conflicts with numerous decisions of other courts. Instead, respondents attempt to reconcile the conflicting precedent by invoking a theory that was *not* adopted by the court of appeals and has not been adopted by any other court. Respondents' novel theory is that the federal cause of action for money had and received should exist only when the government seeks to recover taxes that have been *unconstitutionally* exacted from a federal contractor and should not exist when the taxes have been exacted in violation of state law (Br. in Opp. 2-3, 9). Having constructed a distinction that no court has applied, respondents contend (Br. in Opp. 14-15) that there is no need for further review either (i) of the novel rule for which respondents contend or (ii) of the decision of the court of appeals that, by its own terms, directly conflicts with the decisions of numerous other courts.

Petitioners' novel theory and the decision of the court of appeals are equally inconsistent with precedent. It is well established that the federal cause of action for money had and received exists whether the defendant has received the government's money directly from the plaintiff or through an intermediary or other third party. See, *e.g.*, *Gaines* v. *Miller*, 111 U.S. 395, 397 (1884); Pet. 8-9 n.3. The courts of appeals have therefore consistently held that the United States is entitled to pursue the cause of action for money had and received to recover taxes unlawfully exacted from its contractors, whether those taxes have been paid directly by the United States or have been paid in the first instance by the contractors. See, *e.g.*, *United States* v. *Broward County*, 901 F.2d at 1008; *United States* v. *Michigan*, 851 F.2d 803, 810 (6th Cir. 1988); *City of New Orleans* v. *United States*, 371 F.2d 21, 28 (5th Cir.), cert. denied, 387 U.S. 944 (1967). Respondents simply misstate the law, and ignore a large body of precedent, in contending (Br. in Opp. 8) that only the contractor, and not the government, may sue to recover taxes the burden of which falls on the United States. The decisions of the courts of appeals—including the decision in this case—are uniformly inconsistent with respondents' claim.

Nor is there any support for respondents' novel suggestion (Br. in Opp. 9) that the federal common law claim for money had and received applies only when the tax violates the Constitution and not when the tax is illegal for any other reason. The right of the United States under federal common law to recover property unlawfully taken directly from the United States or from its agents or contractors is not limited to unconstitutional state action. The United States may also invoke this federal common law remedy to recover property unlawfully taken by individuals (see, *e.g.*, *Bayne* v. *United States*, 93 U.S. 642 (1876) (private misappropriation of federal

funds)) or by state governments acting in violation of state law (see, *e.g.*, *United States* v. *Broward County*, 901 F.2d at 1008 (incorrect tax valuation of property under state law)). The remedy has never been limited to situations where the taking violates the Constitution.

3. The conflict created by the decision in this case involves a matter of substantial, recurring administrative importance. Respondents suggest (Br. in Opp. 11-12) that the United States is not prejudiced in this case—other than by losing its claim to recover unlawful taxes—because the federal contractor in this case had brought a state-law refund suit in state court and the United States could have required the contractor to pursue that action to completion. We do not agree that the United States, which must shoulder the burden of the tax, must accept the contractor's state-court refund suit as an alternative to the federal law claim for money had and received. Other than the decision in this case, we are aware of no decision that has reached that conclusion.

Moreover, as the petition recites (Pet. 14-15), the tax dispute in this case is of the ordinary variety that commonly arises under the standard federal service contract that applies to military and civilian facilities located throughout the Nation. It is apparent that confusion would reign under the decision in this case if the United States were left to the laws of the 50 States, and to the diligence of federal contractors, for enforcement of the government's claim for money had and received. By obstructing the right of the United States to litigate these tax issues, the decision of the court of appeals will cause significant uncertainty in the protection of the rights of the United States to recover taxes unlawfully exacted by the States and will multiply the instances where litigation is required to perfect the government's right to recover the large sums often at stake.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

AUGUST 1992

Supreme Court, U.S.
FILED
NOV 18 1992
OFFICE OF THE CLERK

No. 91-2003

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA AND CALIFORNIA STATE BOARD OF EQUALIZATION, RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel of Record for the Petitioner

DANIEL E. LUNGREN
Attorney General of the State of California
ROBERT D. MILAM
Deputy Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
Counsel of Record for the Respondents

PETITION FOR WRIT OF CERTIORARI FILED: JUNE 12, 1992
CERTIORARI GRANTED: OCTOBER 5, 1992

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Docket No. 88-600

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA; AND CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS

RELEVANT DOCKET ENTRIES

DATED	NR	PROCEEDINGS
05/12/88	1	Complaint; . . . summons issued
		* * * *
07/14/88	5	Answer by Defts. to complaint. . . .
08/02/88	6	Amended Answer to Comp. . . .
		* * * *
09/22/88		LDG: Second Amended Answer. . . .
		* * * *
09/30/88	10	Defts' Notc of Mot and Mot for Ord apprvg the filing of Sec Amd Answer LDG: Second Amended Answer. . . .
		* * * *

DATED	NR	PROCEEDINGS
11/22/88	13	Order: Defts' Mot to File Sec Amd Compl [sic] is hereby granted, and the Sec Amd Compl lodged in connection with the motion is now ordered filed. . . .
		* * * *
02/14/89	17	Defts' Notc of Mot S/J. . . .
		* * * *
02/14/89	20	Defts' Request for Judicial Notice. . . .
02/14/89	21	—Decl of Richard Nielsen in Supp of No. 17.
02/14/89	22	—Decl of Robert L. Milam in Supp. of No. 17.
		* * * *
02/15/89	25	Pltf's Mot for S/J. . . .
		* * * *
02/15/89	27	—Decl of Kenneth Meeks (Ex A)
02/15/89	28	—Decl of Raymond Harbert
02/15/89	29	Harbert Decl Attachments 1-24
02/15/89	30	Meeks Decl Attachment 1
		* * * *
02/27/89		Recv'd Defts' Oppo to Pltf's Mot for S/J
		* * * *
02/27/89	32	Pltf's Oppo to Defts' Mot for S/J
		* * * *
03/06/89	37	Memo Pts/Auth in Reply to Defts' Oppo to Pltf's Mot For S/J.
03/06/89	38	Defts' Reply to Pltf's Oppo to Defts' Mot for S/J.
		* * * *
04/25/89	39	Order: that Defts' Mot for S/J is Granted and Pltf's Mot for S/J is Denied.
04/25/89	40	Judgment is hereby entered pursuant to Court's order of 4-25-89, . . .
06/21/89	41	Pltf USAs' Notc of Appeal. . .

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 89-15833

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

STATE OF CALIFORNIA AND CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS-APPELLEES

RELEVANT DOCKET ENTRIES

DATED	FILING-PROCEEDINGS
	* * * *
06/23/89	DOCKETED CAUSE AND ENTERED APPEARANCE OF COUNSEL. Sent appellant's civil appeals docketing statement. . .
	* * * *
05/16/91	Filed Opinion: Affirmed (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. ALARCON; POOLE; HATTER, author.) FILED AND ENTERED JUDGMENT. [89-15833] [ck]
05/30/91	Filed motion and order: (deputy clerk: dg) Aplt's motion for an extension of time to file petition for rehearing is granted. [1938632-1] petition for rehearing due 7/1/91 (motion received 5/30/91) [89-15833] [dg]

DATED	FILING-PROCEEDINGS
07/02/91	. . . Filed original and 40 copies Aplt USA petition for rehearing with suggestion for rehearing en banc 14p.pages, served on 6/28/91 (PANEL AND ACTIVE JUDGES) [89-15833] [dg]
03/18/92	Filed order (ARTHUR L. ALARCON, CECIL F. POOLE, TERRY J. HATTER); the petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. [1957080-1] [89-15833] (dg)
03/27/92	MANDATE ISSUED [89-15833] (dg)
10/13/92	Filed Supreme Court order granting the petition for writ of certiorari under their No. 91-2003. (SC Date: 10/5/92) [89-15833] (dg)

* * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Docket No. 88-600

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA; AND CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS

COMPLAINT

(Filed May 12, 1988)

The plaintiff, the United States of America, by and through its undersigned attorneys, complains and alleges as follows:

1. This Court has jurisdiction over this action under Sections 1331, 1345 and 2201 of Title 28, United States Code, because this action arises under the United States Constitution, involves the interpretation of a federal contract, and is brought by the United States to obtain a declaratory judgment regarding the interests of the United States.

2. This is a civil action instituted by the United States for the purpose of obtaining (1) a declaratory judgment that a Department of Energy management and operating contractor at the Naval Petroleum Reserve was not a construction contractor under California law and that its purchases were therefore exempt from taxation because

they are sales for resale, and (2) a refund of the sales taxes and interest paid by the Government contractor.

3. This action is brought by the United States at the request of the Department of Energy (DOE), an agency of the United States, under the direction of the Attorney General of the United States, to vindicate the sovereign rights and pecuniary interests of the United States.

4. An actual controversy, as is more fully described below, has arisen and now exists between the United States and the defendants concerning their respective rights and claims and the plaintiff is suffering actual and threatened harm by virtue of the actions of the defendants.

5. The plaintiff, United States of America, is a corporate sovereign and body politic.

6. The defendant, the State of California, is a body politic and is named as a defendant because this action concerns the application of its tax statutes and the implementation thereof by its officials and because the plaintiff seeks a refund of taxes paid to the State.

7. The defendant, the California State Board of Equalization, is charged by California law with the interpretation and enforcement of its tax statutes including the sales tax law.

8. Naval Petroleum Reserve No. 1, known as the "Elk Hills Reserve," is located in Kern County, California. It consists of approximately 48,000 acres of land. Title to most of the Elk Hills property is in the United States having been withdrawn from the public domain pursuant to presidential executive orders authorized by the Pickett Act of 1910, 43 U.S.C., Section 141. A portion of the Elk Hills property is and has always been privately owned. The Reserve was initially placed under the jurisdiction of the Secretary of the Navy, then shifted to the Secretary of the Interior in 1921, and thereafter back to the Secretary of the Navy where it remained until October 1, 1977. Pursuant to the DOE Organization Act

(Pub. L. No. 95-91), the Secretary of Energy has been responsible for administering the Reserve since 1977 under authorities set forth in 10 U.S.C., Sections 7420 *et seq.*

9. Standard Oil Company of California (now Chevron U.S.A., Inc.), successor to the property rights of the Southern Pacific Railroad, has long been involved in the Elk Hills Reserve as a land owner. Chevron's present participation as an owner at Elk Hills is pursuant to a congressionally authorized Unit Plan Contract, which establishes the respective rights of Chevron and the United States Government in the Reserve and sets forth the terms and conditions for operating the Reserve as a unit. Chevron owns approximately 20% of the acreage comprising the Reserve, and the Government owns approximately 80%. Act of June 17, 1944, Ch. 262, 58 Stat. 282. This acreage is referred to as "Unit Land."

10. The Unit Land in the Reserve, pursuant to the 1944 Act and the Unit Plan Contract, is operated and managed by a contractor selected by the Secretary (formerly of the Navy, now of DOE). From 1944 to 1975, Chevron was the contractor for the Navy. From October 13, 1975 to July 31, 1985, Williams Brothers Engineering Company (WBEC) was the contractor for the Navy and DOE (Navy Contract No. NOd-10068; DOE Contract No. DE-AC01-80RA32049). From August 1, 1985 to the present, Bechtel Petroleum Operations, Inc., has been the contractor for DOE. The contracts between DOE and WBEC and Bechtel have been management and operating (M&O) contracts. The contract between the Navy and WBEC was in all material respects the same as a management and operating contract.

11. M&O contracts are one of the types of contracts authorized by the Government procurement regulations, the Federal Acquisition Regulations and by the DOE Acquisition Regulations. The Federal Acquisition Regulations define an M&O contract as "an agreement under

which the Government contracts for the operation, maintenance or support, on its behalf, of a Government-owned or controlled research, development, special production or testing establishment wholly owned or principally devoted to one or more major programs of the contracting Federal agency." 48 C.R.F., Ch. 1, Subpart 17.6.

12. In both contracts with WBEC, the Government retained responsibility for overall policy direction and program management technical direction of projects and all financial risk. Under both contracts, WBEC was hired for a fixed term and a fee and was generally responsible for the day-to-day management of operations and of support services such a administration and procurement. The physical labor necessary to perform construction was provided by independent contractors hired by WBEC. Although the nature of the contracts was "cost-reimbursement," funds were actually advanced by the Government pursuant to a provisional payment system under the Navy contract and a letter of credit for use by WBEC as needed under the DOE contract. This was provided for by Part II Section J.12 of the DOE-WBEC contract.

13. While WBEC managed and operated the Elk Hills Reserve it procured virtually all the personal property and services for the operations at the Reserve. The property WBEC purchased for the operation of the Reserve included office supplies and equipment, construction equipment, fuel and lubricants, automobiles and trucks, hand tools, safety and first aid equipment and oil field materials and equipment such as oil well casings, line and gathering pipe, pumps and compressors, valves, sucker rods and electric switching units. Both contracts provided in a standard Government property clause that title to all property purchased by the contractor for the Government passed from the vendor to the United States. The materials procured for the Government were either stored in inventory or used immediately by contractors other than WBEC, in construction or drilling operations.

14. WBEC was also responsible for the procurement of contractors to carry out construction and drillling activities. These construction contractors' services were procured at the direction of the owners, the United States and Chevron; and WBEC was obligated by the terms of the operating contracts to carry out those directions. However, WBEC was not liable to the successful completion of construction. Rather, the operating contractor was only obligated to follow the directives of the owners in awarding a contract to a construction contractor who had been approved by the owners. WBEC was prohibited from performing activities such as construction and drilling and WBEC was not insured against liability which might arise from such activities.

15. WBEC, as the operating contractor, was not responsible for the construction or drilling, but rather, was required to inspect and monitor the construction and drilling to ensure compliance by the construction and drilling contractors with the plans previously approved by the unit owners, Chevron and DOE. Under the WBEC operating contracts, directions governing drilling or construction originated with the owners, not with WBEC.

16. On July 5, 1978, the State of California issued a Notice of Determination to WBEC asserting a deficiency of $2,932,716.54, plus interest, in the payment of sales and use taxes for the years 1975-77. WBEC sought an administrative redetermination which ultimately led to an adverse decision which was appealed to the State Board of Equalization. The Board reduced the tax obligation by somewhat less than $400,000. The remainder of $2,550,334.86, with interest of $1,468,221.03, a total of $4,018,555.89, was paid under protest on May 13, 1982.

17. On December 13, 1982, a second Notice of Determination was issued by the State asserting a tax deficiency of $7,483,062.36, plus interest of $2,635,235.18, covering the period 1978-81. After an unsuccessful administrative appeal, the tax and interest which totaled

$10,118,297.54, were paid under protest on January 12, 1983.

18. The State concede that when the Government itself installed material purchased by WBEC, the contractor was not liable for sales taxes and refunded $1,355,306.39 for the 1975-77 period and $1,827,791.37 for the 1978-81 period to WBEC.

19. Pursuant to the contract between WBEC and DOE, WBEC paid the sales taxes with Government funds disbursed under a letter of credit issued by DOE. The refunds by the State of California were deposited in the United States Treasury.

20. Under the terms and conditions of the contracts between WBEC and the Government, WBEC was not responsible for the installation of the property it purchased and thus was not a construction contractor as defined by Cal. Sales and Use Tax Reg. 1521(a)(2) and (B). Therefore, purchases by WBEC were exempt from California sales taxes because the sales were for the purpose of resale since title to the property transferred to the Government upon delivery. Alternatively, a significant portion of the purchases made by WBEC were exempt from California sales taxes because the items purchased were machinery and equipment not affixed to the realty which under Cal. Reg. 1521(b) are nontaxable sales for resale.

WHEREFORE, the plaintiff, the United States of America, prays as follows:

1. That this Court enter a judgment declaring (1) that under the terms and conditions of the contracts between WBEC and the Government, WBEC was not responsible for the installation of the property it purchased and thus was not a construction contractor as defined by Cal. Sales and Use Tax Reg. 1521(a)(2) and (3), and that, therefore, purchases by WBEC were exempt from California sales taxes because the sales were for the purpose of resale since title to the property was transferred to the Government upon delivery, and, alternatively (3) that a

significant portion of the purchases made by WBEC were machinery and equipment not affixed to the realty which under Cal. Reg. 1521(b) are nontaxable sales for resale.

2. That this Court order the defendant to refund, with interest, the $14,136,853.43 in taxes and interest that WBEC paid on May 13, 1982, and January 12, 1983, to the State in sales taxes on the its purchases for DOE.

3. That this Court grant the plaintiff its costs in this action and such other and further relief as is just, equitable and proper.

Dated: May 10th, 1988.

Respectfully submitted,

DAVID F. LEVI
United States Attorney

YOSHINORI H. T. HIMEL
Assistant United States Attorney

WILLIAM S. ROSE, JR.
JOHN J. MCCARTHY
RICHARD A. CORREA
Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 227
Washington, D.C. 20044
Ben Franklin Station
Telephone: (202) 724-6555

By: /s/ John J. McCarthy
JOHN J. MCCARTHY
Attorneys for Plaintiff,
United States of America

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

SECOND AMENDED ANSWER

(Filed September 22, 1988)

Defendants STATE OF CALIFORNIA and STATE BOARD OF EQUALIZATION hereby answer the complaint for declaratory relief and for refund of taxes by admitting, denying and alleging as follows:

1. Deny the allegations contained in paragraphs 1, 12, 14, 15 and 20 of said complaint.

2. Admit the allegations contained in paragraphs 5, 7, 8, and 11 of said complaint.

3. Admit the allegations contained in paragraph 2 of said complaint only to the extent that the paragraph describes the allegations in the complaint. In further answer to the allegations contained in paragraph 2, defendants deny that a Department of Energy management and operating contractor at the Naval Petroleum Reserve is not a construction contractor and deny that a refund of taxes is due.

4. Admit the allegations contained in paragraph 3, save and except for the allegation that the suit seeks to vindicate the sovereign right and pecuniary interest of the United States, which allegation is denied.

5. Deny the allegations contained in paragraph 4, of said complaint. In further answer to the allegations contained in paragraph 4, defendants allege that the United States Government has no standing to bring this suit

because no tax was assessed against the United State and no tax was collected from or paid by the United States.

6. Admit the allegations contained in paragraph 6 of said complainnt, save and except for the allegation that the United States seek a refund of taxes that it paid to the state, which allegation is denied. In further answer to the allegations contained in paragraph 6, defendants allege that the taxes were paid by WBEC and not by the United States.

7. In answering the allegations contained in paragraph 9 of said complaint, defendants have no information or knowledge of the actual percentage of the total acreage owned by Chevron, and on that basis deny the allegations contained therein.

8. Admit the allegations contained in paragraph 10 of said complaint. In further answer to the allegations contained in paragraph 10, defendants allege that the contracts between DOE and WBEC and the Navy and WBEC are contracts for the construction of improvements to real property within the meaning of California Revenue and Taxation Code sections 6384 and 6007.5 and Regulation 1521.

9. Admit the allegations contained in paragraph 13 of said complaint, save and except for the allegation that the Government Property Clause passes title to the property purchased from the vendor directly to the United States, which allegation is denied.

10. Admit the allegations contained in the first sentence of paragraph 16. In further answer to the allegations contained in the first sentence of paragraph 16, defendants allege that the actual period of determination was November 14, 1975 to December 31, 1977. Defendants admit the allegations contained in the second sentence of paragraph 16. Defendants admit the allegations contained in the third sentence of paragraph 16, except defendant alleges that the Board records show that the payment of $4,018,555.59 to have been made effective April 30, 1982.

11. Admit the allegations contained in paragraph 17 of said complaint. In further answer to the allegations contained in paragraph 17, defendants allege that on December 13, 1982, defendant Board of Equalization issued two notices of determination to WBEC, which together covered the period January 1, 1978 to December 31, 1981, a total tax deficiency of $7,483,062.26 and the amount of interest calculated through December 13, 1982, was $2,598,332.48 and that payment was made on December 23, 1982.

12. Admit the allegations contained in paragraph 18 of said complaint. In further answer to the allegations contained in paragraph 18, defendants allege that these refunds were granted by defendant Board of Equalization in two suits for tax refund brought by WBEC in state court. These suits are Los Angeles County Superior Court case numbers C 473 190 and C 443 028, cover the same periods and same liability as in this action, and were dismissed after the refunds were granted.

13. Defendants have no knowledge or information sufficient to enable them to answer the allegations contained in paragraph 19 of said complaint and upon that basis deny the allegations contained therein. In further answer to the allegations contained in paragraph 19, defendants allege that WBEC paid the taxes and WBEC was the recipient of those amounts refunded.

AFFIRMATIVE DEFENSES

As a first, separate, and affirmative defense defendants allege:

1. Plaintiff's claim for declaratory relief is not appropriate in this case because there is no controversy between the parties to the contract about the meaning of the contract.

As a second, separate and affirmative defense, defendants allege:

2. Plaintiffs have failed to join an indispensible party to the action, WBEC the other party to the contract for which declaratory relief is requested.

As a third, separate and affirmative defense, defendants allege:

3. Plaintiffs are precluded from pursuing the claims and/or issues raised in this action by the application of the principles of res judicata and/or collateral estoppel.

As a fourth, separate and affirmative defense, defendants allege:

4. Plaintiffs are precluded from the Statute of Limitations in 28 United States Code section 2415(a) from pursuing this action in that the suit was not brought within six years of the time the cause of action occurred.

WHEREFORE, defendants pray as follows:

1. That this Court determine and adjudge that defendant Board of Equalization properly imposed a tax against WBEC for the amounts and time periods alleged in this answer;

2. That the Court determine and adjudge that the suits filed by WBEC in state court for the same amounts and for the same periods alleged in the complaint preclude the United States from pursuing these claims in this Court;

3. That this Court determine and adjudge that the United States was not assessed any tax nor paid any tax assessed by the State of California;

4. That plaintiff takes nothing by this action;

5. That defendant recover its costs in this action; and

6. That this Court order such other and further relief as is just, equitable, and proper.

DATED: September 21, 1988

JOHN K. VAN DE CAMP
Attorney General
of the State of California
ROBERT F. TYLER
Supervising Deputy
Attorney General

By: /s/ Robert D. Milam
ROBERT D. MILAM
Deputy Attorney General

Attorneys for Defendants
State Board of Equalization

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DEFENDANTS' AMENDED NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

(Filed February 14, 1989)

PLEASE TAKE NOTICE that on March 31, 1989, at 1:30 p.m. or as soon thereafter as the matter may be heard before the Honorable Lawrence K. Karlton, Chief Judge of the United States District Court located at 650 Capitol Mall, Sacramento, California, defendants will move the Court for summary judgment in favor of defendants and against plaintiffs. The grounds of said motion are as follows:

1. Plaintiff is precluded by the principles of Res Judicata/Collateral Estoppel from maintaining this action;
2. Plaintiff is barred by the Statute of Limitation in 28 United States Code section 2415 from recovering at least one of the payments sought in this action; and
3. WBEC is as a matter of law a construction contractor under its contract with the United States.

This motion will be based upon this motion, the Defendant's Statement of Undisputed Fact, the Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, Defendants' Request for Judicial Notice, the Declaration of Robert D. Milam in Support of Defendants' Motion for Summary Judgment, the Declaration of Donald J. Hennessy in Support of Defendants' Motion for Summary Judgment, the

Declaration of Richard D. Nielsen in Support of Defendants' Motion for Summary Judgment, and such other evidence as may be adduced at the hearing on said matter.

DATED: February 15, 1989

JOHN K. VAN DE KAMP
Attorney General
of the State of California
ROBERT F. TYLER
Supervising Deputy
Attorney General

By /s/ Robert D. Milam
ROBERT D. MILAM
Deputy Attorney General

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

(Filed February 14, 1989)

Defendant Board of Equalization of the State of California hereby requests this Court to take judicial notice of the following documents:

1. Certified copy of the Complaint and attached exhibits in the case of *Williams Brothers Engineering Company* v. *Board of Equalization of the State of California*, Los Angeles County Superior Court No. C 443 028. This complaint is attached hereto as Exhibit A.

2. Certified copy of the Complaint and attached exhibits in the case of *Williams Brothers Engineering Company* v. *Board of Equalization of the State of California*, Los Angeles County Superior Court No. C 473 190. This complaint is attached hereto as Exhibit B.

3. A certified copy of the Partial Judgment Pursuant to Stipulation in Los Angeles County action number C 443 028. The Stipulation is attached hereto as Exhibit C.

4. A certified copy of the Notice of Dismissal in Los Angeles County action number C 443 028. This Notice is attached hereto as Exhibit D.

5. A certified copy of the Partial Judgment Pursuant to Stipulation in Los Angeles County action number C 473 190. The stipulation is attached hereto as Exhibit E.

6. A certified copy of the Notice of Dismissal in Los Angeles County action number C 473 190. This Notice is attached hereto as Exhibit F.

7. A copy of the transcript of the hearing on the Petition for Redetermination before the Board of Equalization held on January 8, 1981, and certificated by the reporter. The transcript is attached hereto as Exhibit G.

8. The official publication of Regulation 1521 in title 18, California Administrative Code, section 1521. A copy of the official regulation is attached hereto as Exhibit H.

DATED: Feb. 13, 1989

JOHN K. VAN DE KAMP
Attorney General
of the State of California
ROBERT F. TYLER
Supervising Deputy
Attorney General

By /s/ Robert D. Milam
ROBERT D. MILAM
Deputy Attorney General

Attorneys for Defendant
State Board of Equalization

EXHIBIT "A"

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C443028

WILLIAMS BROTHERS ENGINEERING COMPANY,
an Oklahoma Corporation, PLAINTIFF

vs.

BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA, DEFENDANT

COMPLAINT FOR REFUND OF CALIFORNIA SALES TAX PAID

[Filed Feb. 18, 1983]

Plaintiff alleges:

I.

At all times mentioned herein, Plaintiff, WILLIAMS BROTHERS ENGINEERING COMPANY, is and at all relevant times has been a corporation organized and existing under the laws of the State of Oklahoma, with its principal place of business in Kern County.

II.

Defendant, BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, is, and at all material times herein was, an agency of the State of California charged by law with the duty of administering the California Sales and Use Tax Law.

III.

Jurisdiction of this action is vested in this court under California Code of Civil Procedure § 410.10.

IV.

Venue of this section is properly based in Los Angeles County under California Revenue and Taxation Code § 6933, as the Attorney General has an office in Los Angeles County.

V.

Plaintiff filed California Sales and Use Tax returns with Defendant when due for the period between November 14, 1975, through December 31, 1977, and Plaintiff timely paid all taxes so reported to Defendant when due.

VI.

Upon audit of Plaintiff, Defendant sent Plaintiff a Notice Of Determination under the Sales And Use Tax Law, dated July 5, 1978, stating that a deficiency in sales and use tax in the amount of $2,932,716.54 plus interest was due for the period commencing November 14, 1975, through December 31, 1977. On August 3, 1978, Plaintiff filed a Petition For Redetermination with Defendant, requesting a hearing. On January 30, 1979, a hearing before Defendant was held. On April 13, 1982, Plaintiff received notice from Defendant of its order that the deficiency in taxes originally determined be reduced by $382,381.68, leaving a balance of tax owed as redetermined of $2,550,334.86 plus interest of $1,468,221.03, for a total of taxes plus interest owed of $4,018,555.89. On or before May 13, 1982, Plaintiff paid said amount to Defendant under protest. On October 1, 1982, Plaintiff filed a Claim For Refund with the Defendant. Defendant denied the Claim For Refund and sent Notice Of Denial Of Claim For Refund on November 22, 1982. This

action is brought within ninety days of the date of such Notice. Accordingly, Plaintiff has exhausted its administrative remedies and now brings this court action under authority of California Revenue and Taxation Code § 6933.

VII.

Said asserted deficiency of $4,018,555.89 for the period commencing November 14, 1975, and ending December 31, 1977, was arbitrarily, erroneously, and illegally determined by Defendant on the basis of grossly incorrect and unwarranted assumptions, and without foundation in fact.

VIII.

The Claim For Refund filed by Plaintiff on October 1, 1982, with Defendant is attached hereto, marked Exhibit "A," and made a part hereof as though set forth in full, except for Paragraph 5.C thereof. In light of the facts set forth in the Claim for Refund incorporated herein, the alleged deficiency as set forth in the Notice of Redetermination, and the taxes collected pursuant thereto, are illegal, erroneous, excessive, and improper in that:

A. If Plaintiff is regarded, contrary to the provisions of the contract, as having acquired materials from vendors and then reselling the materials to the United States Government, such transactions by Plaintiff cannot be subjected to the California sales tax by reason of California Revenue and Taxation Code § 6381.

B. No tax can be assessed against Plaintiff on the authority of California Revenue and Taxation Code § 6384. That section provides only for a sales tax to be imposed on the vendor. If any sales tax were payable on purchases by Plaintiff on behalf of the Goverment, such tax would be due only by those vendors and could not be assessed against Plaintiff.

C. Further, no tax would be due from Plaintiff or any of the persons who supplied materials to Plaintiff

under California Revenue and Taxation Code § 6384 inasmuch as Plaintiff was not a "construction contractor" within the meaning of that section. This is true as to all of the materials purchased by Plaintiff.

D. Plaintiff cannot be subject to use tax on any of the property purchased by the United States Government through Plaintiff since Plaintiff never held title to any of these items and cannot, therefore, make a taxable "use" of these materials. *Lockheed Aircraft Corp. v. State Board of Equalization*, 81 Cal. App. 3d 257 (1978).

E. No tax was due from Plaintiff or any of those persons who supplied materials to Plaintiff on purchases made by Plaintiff under the contract for the United States Government since Plaintiff was acting solely as an agent for the United States Government, and imposition of a tax on purchases made by the United States Government is prohibited by California Revenue and Taxation Code § 6381.

F. As to the NAVFAC procurements, a refund based on the exclusion of $10,166,154.18 from the measure of the tax should be made.

WHEREFORE, Plaintiff prays for judgment against Defendant

(1) in the amount of $4,018,555,89 and such other amounts to which Plaintiff may be entitled,

(2) for interest allowable by statute,

(3) for cost of suit hereof, and

(4) for such other and further relief as this court may deem just and proper.

Date: 2-18-'83

ARMSTRONG, HENDLER & HIRSCH
A Professional Corporation

By: s [Illegible]
Attorneys for Plaintiff

VERIFICATION

I am an officer of the Plaintiff in the above entitled proceeding; I have read the foregoing Complaint and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on February 17, 1983 at Elk Hills, California.

/s/ Raymond C. Harbert
(Name)
RAYMOND C. HARBERT
Vice President
(Title)

October 1, 1982

State Board of Equalization
1020 North Street
Sacramento, California 95814

Attention: Refund Unit

Re: *Claim for Refund, California Sales Tax Matter*

Gentlemen:

Williams Brothers Engineering Company ("Taxpayer" or "WBEC") herein, the person against whom the determination described below was made, on behalf of itself and the United States Government, the real party in interest, respectfully submits the following Claim for Refund ("Claims"):

1. *Identification of Taxpayer.*

Williams Brothers Engineering Company
P.O. Box 86
Tupman, California 93276

2. *Periods Involved.*

November 14, 1975, through December 31, 1977

3. *Prior Proceedings.*

Taxpayer filed a Petition for Redetermination (the "Petition"), and a hearing was held by the State Board of Equalization. A Notice of Redetermination, attached as Exhibit 1, dated April 13, 1982, was served on Taxpayer. Taxpayer timely paid the alleged deficiency. This Claim is filed within 6 months of the date of such payment.

4. *Refund Claimed.*

A refund is claimed for the entire amount paid as above set forth, in the amount of $2,550,334.86, together with interest as provided by law.

5. *Grounds for Refund.*

5.A *Factual Background.*

This claim for refund is filed as required by Section 6932 (all section references, unless otherwise indicated are to the California Revenue and Taxation Code) for the purpose of exhausting Taxpayer's administrative remedies in order that the issues here involved can be tested through appropriate litigation. The factual matters upon which the Claim is based, and many of the legal arguments, have been the subject of extensive submissions to the Board of Equalization in connection with the Petition. Taxpayer hereby incorporates by reference the factual submission designated "Preliminary and Jurisdictional Statement", which included copies of all of the relevant documents, submitted to Mr. D. J. Hennessey at a Staff Hearing on January 30, 1979, and the Supplemental Brief submitted to the Board of Equalization following the hearing before it on January 8, 1981.

As set forth in those materials, Petitioner entered into a contract with the United States Government, through the Secretary of Navy (now Secretary of Energy pursuant to P.L. 95-91), dated October 13, 1975. For convenience, an additional copy of that contract is appended hereto as Exhibit 2.

Pursuant to the said Contract, Petitioner, acting on behalf of the United States Government and not in its own right, negotiated with various suppliers to provide articles of tangible personal property to be used by the United States Government in work being conducted at Elk Hills. Under the terms of the Contract with the United States Government, Petitioner never had title to any of such materials, and did not become the beneficial owner of any interest therein. Title thereto passed directly from the various vendors to the United States Government pursuant to the provisions of the Contract, and of various agreements with vendors which were ne-

gotiated by Petitioner on behalf of the United States Government.

The materials acquired by the United States Government through WBEC were, in general, ultimately used in the construction of improvements to the Elk Hills facilities.

In some cases, installation of the materials in connection with projects was administered by WBEC. In that capacity, WBEC has the responsibility of hiring a subcontractor designated by the United States Government to complete installation of the material. WBEC did not, however, have responsibility for the job or for completion of the installation. Its function was solely that of servicing the administration of the contract, and not of a construction contractor.

Certain materials acquired by the United States Government through WBEC were placed in inventory. From inventory, they were drawn on as needed for installation in various projects at Elk Hills. Some of these projects were ones administered by other contractors; some of them were administered by WBEC.

In both of these cases, it is WBEC's position that it was not a "construction contractor" within the meaning of Section 6384. The conclusion to the contrary set forth in the Notice of Redetermination is erroneous.

5.B *Special Item: The NAVFAC Procurements.*

The Board, in its Notice of Redetermination, and throughout these proceedings, has apparently agreed that amounts reflecting the cost of materials purchased through WBEC which were installed by the Naval Facilities Commond ("NAVFAC"), on the LTS#1 Plant and the High Pressure Injection Plant should be excluded from the measure of the tax, since WBEC's only function as to these procurements relates to purchasing, and WBEC is not the "construction contractor" within the meaning of Section 6384 as to these procurements.

Despite this agreement on the legal issues the measure of the tax set forth in the Notice of Redetermination does not exclude the cost of materials procured for these projects on the grounds that "documentation necessary to delete" these purchases had not been submitted.

There is attached as Exhibit "3" a Summary setting forth the amount of these procurements improperly included in the measure of the tax, aggregating $10,166,154.18. The invoices described thereon are not submitted here since their bulk renders such a submission impractical. They are, however, available at the offices of the Taxpayer for review and audit.

5.C *Legal Basis for Refund.*

In the light of the foregoing, the alleged deficiency as set forth in the Notice of Redetermination, and the taxes collected pursuant thereto, are illegal, erroneous, excessive and improper in that:

A. If WBEC is regarded, contrary to the provisions of Contract as having acquired materials from vendors, and then reselling it to the United States Government, such transactions by WBEC cannot be subjected to the California sales tax by reason of the United States Constitution and Section 6381.

B. No tax can be assessed against WBEC on the authority of Section 6384. That Section provides only for a sales tax to be imposed on the vendor. If any sales tax were payable on purchases by WBEC on behalf of the Government, such tax would be due only by those vendors, and could not be assessed against WBEC.

C. Further, no tax would be due from WBEC or any of the persons who supplied materials to WBEC under Section 6384 inasmuch as WBEC was not a "construction contractor" within the meaning of that section. This is true as to all of the materials purchased by WBEC.

D. WBEC cannot be subject to use tax on any of the property purchased by the United States Government

through WBEC since WBEC never held title to any of these items and cannot, therefore, make a taxable "use" of these materials. *Lockheed Aircraft Corp. v. State Board of Equalization*, 81 Cal.App. 3d 257 (1978).

E. No tax was due from WBEC or any of those persons who supplied materials to WBEC on purchases made by WBEC under the contract for the United States Government since WBEC was acting solely as an agent for the United States Government, and imposition of a tax on purchases made by the United States Government is prohibited by the Constitution of the United States, and by Section 6381.

F. The application of the California Sales Use Tax to the purchase of materials by the United States Government under Section 6384 would discriminate against the Government and those doing business with it, in that the basis of the tax is different from that applicable to contractors doing business with private parties and with California governmental entities.

G. As to the NAVFAC procurements, a refund based on the exclusion of $10,166,154.18 from the measure of the tax should be made.

6. *Communications.*

It is respectfully requested that copies of all future notices and correspondence be sent to Taxpayer's representative:

Arthur O. Armstrong, Esq.
Armstrong, Hendler & Hirsch
1888 Century Park East, Suite 1888
Los Angeles, California 90067
Telephone: (213) 553-0305

Executed at Elk Hills, California, on this 7th day of October, 1982.

WILLIAMS BROTHERS
ENGINEERING COMPANY

By: /s/ C. H. Barnfield
C. H. BARNFIELD
General Manager

EXHIBIT "B"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C473090

WILLIAMS BROTHERS ENGINEERING COMPANY,
an Oklahoma Corporation, PLAINTIFF

vs.

BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA, DEFENDANT

COMPLAINT FOR REFUND OF CALIFORNIA
SALES TAX PAID

[Filed Oct. 26, 1983]

Plaintiff alleges:

I.

At all times mentioned herein, Plaintiff, WILLIAMS BROTHERS ENGINEERING COMPANY, is and at all relevant times has been a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Tulsa, Oklahoma.

II.

Defendant, BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, is, and at all material times herein was, an agency of the state

of California charged by law with the duty of administering the California Sales and Use Tax Law.

III.

Jurisdiction of this action is vested in this court under Cal. Civ. Proc. Code § 410.10.

IV.

Venue of this action is properly based in Los Angeles County under Cal. Rev. & Tax. Code § 6933, as the Attorney General has an office in Los Angeles County.

V.

Plaintiff filed California Sales and Use Tax returns with Defendant when due for the period between January 1, 1978, through December 31, 1981, and Plaintiff timely paid all taxes so reported to Defendant when due.

VI.

Upon audit of Plaintiff, Defendant sent Plaintiff a Notice of Determination under the Sales and Use Tax Law, dated December 13, 1982, stating that a deficiency in sales and use tax in the amount of $7,483,062.36 plus interest was due for the period commencing January 1, 1978, through December 31, 1981. On or before January 12, 1983, Plaintiff paid $10,118,297.54, representing the alleged deficiency plus interest, to Defendant under protest. On May 25, 1983, Plaintiff filed a Claim for Refund with the Defendant. Defendant denied the Claim for Refund and sent a Notice of Denial of Claim for Refund on August 2, 1983. This action is brought within ninety days of the date of such Notice. Accordingly, Plaintiff has exhausted its administrative remedies and now brings

this court action under authority of Cal. Rev. & Tax. Code § 6933.

VII.

Said asserted deficiency of $7,483,062.36 for the period commencing January 1, 1978, and ending December 31, 1981, was arbitrarily, erroneously, and illegally determined by Defendant on the basis of grossly incorrect and unwarranted assumptions, and without foundation in fact.

VIII.

The Claim for Refund filed by Plaintiff on May 25, 1983, with Defendant is attached hereto, marked Exhibit "A," and made a part hereof as though set forth in full. In light of the facts set forth in the Claim for Refund incorporated herein, the alleged deficiency as set forth in the Notice of Denial, and the taxes collected pursuant thereto, are illegal, erroneous, excessive, and improper in that:

A. If WBEC is regarded, contrary to the provisions of the Contract as having acquired materials from vendors, and reselling it to the United States Government, such transactions by WBEC cannot be subject to the California sales tax by reason of the United States Constitution and Cal. Rev. & Tax. Code § 6381.

B. No tax can be assessed against WBEC on the authority of Cal. Rev. & Tax. Code § 6384. That section provides only for a sales tax to be imposed on the vendor. If any sales tax were payable on purchases by WBEC on behalf of the government, such tax would be due only by those vendors, and could not be assessed against WBEC.

C. Further, no tax would be due from WBEC or any of the persons who supplied materials to WBEC under § 6384 inasmuch as WBEC was not a "construction contractor" within the meaning of that section. That is true as to all of the materials purchased by WBEC.

D. WBEC cannot be subject to use tax on any of the property purchased by the United States government through WBEC since WBEC never held title to any of these items and cannot, therefore, make a taxable "use" of these materials. *Lockheed Aircraft Corp. v. State Board of Equalization*, 81 Cal. App. 3d 257 (1978).

E. No tax is owed for that property that never was incorporated into real property improvements, because § 6384 only covers improvements to real property, and other purchases by the United States government would be exempt under § 6381.

F. To the extent that sales tax was paid to other states, WBEC is entitled to a credit against California tax under Cal. Rev. & Tax. Code § 6406.

G. No tax may be imposed on WBEC's leasing of tangible personal property from lessors to the extent the lessors paid sales tax reimbursement or use tax on their purchase of the property. Cal. Rev. & Tax. Code § 6006 (g)(5).

H. The materials used in construction by NAVFAC should be excluded from the measure of tax because WBEC's only function as to these procurements relates to purchasing, and WBEC is not the "construction contractor" within the meaning of § 6384 as to these procurements.

I. No sales or use tax can be imposed on WBEC because the United States, not WBEC, was the only party that purchased or used the property.

J. Cal. Rev. & Tax. Code § 6384 unconstitutionally discriminates against the United States Government and those doing business with it.

WHEREFORE, Plaintiff prays for judgment against Defendant

(1) in the amount of $10,118,297.54 and such other amounts to which Plaintiff may be entitled,

(2) for interest allowable by statute,

(3) for cost of suit hereof and

(4) for such other and further relief as this court may deem just and proper.

Date: 10-26-83

ARMSTRONG, HENDLER & HIRSCH
A Professional Corporation

By: s/ [Illegible]
Attorneys for Plaintiff

May 25, 1983

State Board of Equalization
1020 N Street
Sacramento, California 95814

Attention: Refund Unit

Re: *Claim for Refund, California Sales Tax Matter*

Gentlemen:

Williams Brothers Engineering Company ("Taxpayer" or "WBEC") herein, the person against whom the determination described below was made, on behalf of itself and the United States government, the real party in interest, respectfully submits the following Claim for Refund ("Claim"):

1. *Identification of Taxpayer*

Williams Brothers Engineering Company
P.O. Box 86
Tupman, California 93276

2. *Periods Involved*

January 1, 1978, through December 31, 1981

3. *Prior Proceedings*

Notices of Determination, attached as Exhibit 1, dated December 13, 1982, were served on Taxpayer. Taxpayer timely paid the alleged deficiency. This Claim is filed within six months of the date of such payment.

4. *Refund Claimed*

A refund is claimed for the entire amount paid as above set forth, in the amount of $10,118,297.54, together with interest as provided by law.

5. *Grounds for Refund*

5.A. *Factual Background*

This Claim for refund is filed as required by Section 6932 (all section references, unless otherwise indicated are to the California Revenue and Taxation Code) for the purpose of exhausting Taxpayer's administrative remedies in order that the issues herein involved can be tested through appropriate litigation. The factual matters upon which the Claim is based, and many of the legal arguments, have been the subject extensive submissions to the Board of Equalization in connection with a Petition for Redetermination filed for the period November 14, 1975, through December 31, 1977, in connection with an alleged deficiency for the period prior to the period involved in this Claim. Taxpayer hereby incorporates by reference the factual submission designated "Preliminary and Jurisdictional Statement," which included copies of all of the relevant documents, submitted to Mr. D. J. Hennessey at a Staff Hearing on January 30, 1979, and the Supplemental Brief submitted to the Board of Equalization following the hearing before it on January 8, 1981, in connection with the Petition for Redetermination.

As set forth in those materials, Petitioner entered into a contract ("Contract") with the United States government, through the Secretary of Navy (now the Secretary of Energy pursuant to P.L. 95-91), dated October 13 1975. For convenience, an additional copy of the Contract is appended hereto as Exhibit 2.

Pursuant to the Contract, Petitioner, acting on behalf of the United States government and not in its own right, negotiated with various suppliers to provide articles of tangible personal property to be used by the United States government in work being conducted at Elk Hills. Under the terms of the Contract with the United States government, Petitioner never had title to any of such materials,

and did not become the beneficial owner of any interest therein. Title thereto passed directly from the various vendors to the United States government pursuant to the provisions of the Contract and of various agreements with vendors which were negotiated by Petitioner on behalf of the United States government.

The majority of the materials acquired by the United States government through WBEC were ultimately used in the construction of improvements to the Elk Hills facilities. However, some tangible personal property acquired by the United States government was never incorporated into any real property improvements.

In some cases, installation of the materials in connection with projects was administered by WBEC. In that capacity, WBEC had the responsibility of hiring a subcontractor designated by the United States government to complete installation of the material. WBEC did not, however, have responsibility for the job or for completion of the installation. Its function was solely that of servicing the administration of the contract, and not of a construction contractor.

Certain materials acquired by the United States government through WBEC were placed in inventory. From inventory, they were drawn on as needed for installation in various projects at Elk Hills. Some of these projects were ones administered by other contractors; some of them were administered by WBEC. In both of these cases, it is WBEC's position that it was not a "construction contractor" within the meaning of Section 6384.

Certain of the materials were purchased out of state and sales tax was paid in those states.

Much of the property on which tax was assessed was leased from lessors. In many instances, the lessors had paid sales tax reimbursement or use tax on their purchase of the property.

Much of the materials purchased by the United States Government through WBEC were installed by the Naval

Facilities Command ("NAVFAC"), on the LTS # 1 Plant and the High Pressure Injection Plant.

5.B. *Legal Basis for Refund*

In the light of the foregoing, the alleged deficiency as set forth in the Notices of Determination, and the taxes collected pursuant thereto, are illegal, erroneous, excessive, and improper in that:

A. If WBEC is regarded, contrary to the provisions of the Contract as having acquired materials from vendors, and reselling it to the United States government, such transactions by WBEC cannot be subjected to the California sales tax by reason of the United States Constitution and Section 6381.

B. No tax can be assessed against WBEC on the authority of Section 6384. That Section provides only for a sales tax to be imposed on the vendor. If any sales tax were payable on purchases by WBEC on behalf of the government, such tax would be due only by those vendors, and could not be assessed against WBEC.

C. Further, no tax would be due from WBEC or any of the persons who supplied materials to WBEC under Section 6384 inasmuch as WBEC was not a "construction contractor" within the meaning of that section. This is true as to all of the materials purchased byWBEC.

D. WBEC cannot be subject to use tax on any of the property purchased by the United States government through WBEC since WBEC never held title to any of these items and cannot, therefore, make a taxable "use" of these materials. *Lockheed Aircraft Corp. v State Board of Equalization*, 81 Cal.App. 3d 257 (1978).

E. No tax was due from WBEC or any of those persons who supplied materials to WBEC on purchases made by WBEC under the contract for the United States government since WBEC was acting solely as an agent for the United States government, and imposition of a tax on purchases made by the United States government is

prohibited by the Constitution of the United States and by Section 6381.

F. The application of the California Sales and Use Tax to the purchase of materials by the United States government under Section 6384 would discriminate against the government and those doing business with it, in that the basis of the tax is different from that applicable to contractors doing business with private parties and with California governmental entities.

G. No tax is owed for that property that never was incorporated into real property improvements, because § 6384 only covers improvements to real property, and other purchases by the United States government would be exempt under Section 6381.

H. To the extent that sales tax was paid to other states, WBEC is entitled to a credit against California tax under Section 6406.

I. Because WBEC is an agent of the United States government, no use tax may be imposed on WBEC's leasing of tangible personal property from lessors by reason of the United States Constitution and Section 6352. Further, no sales tax may be imposed on the lessors of the leased property because the legal incidence of such tax falls on the United States government. *U.S. v. California S.B.E.*, 650 F.2d 1127 (9th Cir. 1981).

J. No tax may be imposed on WBEC's leasing of tangible personal property from lessors to the extent the lessors paid sales tax reimbursement or use tax on their purchase of the property. Section 6006(g)(5).

K. The materials used in construction by NAVFAC should be excluded from the measure of tax because WBEC's only function as to these procurements relates to purchasing, and WBEC is not the "construction contractor" within the meaning of § 6384 as to these procurements.

6. *Communications*

It is respectfully requested that copies of all future notices and correspondence be sent to Taxpayer's representative:

Arthur O. Armstrong, Esq.
Armstong. Hendler & Hirsch
1888 Centry Park East, Suite 1888
Los Angeles, California 90067

Executed at Elk Hills, California, on this 3rd day of June, 1983.

WILLIAMS BROTHERS ENGINEERING COMPANY

By: s/ C. H. Barfield
C. H. BARFIELD
General Manager

VERIFICATION

I am an officer of the Plaintiff in the above entitled proceeding; I have read the foregoing Complaint and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on 14 October 1983 at Tupman, California.

s/ Raymond C. Harbert
RAYMOND C. HARBERT
Vice President
(Title)

EXHIBIT "C"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 443 028

WILLIAM BROTHERS ENGINEERING COMPANY,
an Oklahoma corporation, PLAINTIFF

v.

BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA, DEFENDANT

PARTIAL JUDGMENT PURSUANT TO
STIPULATION

WHEREAS, plaintiff has instituted this action against defendant; and

WHEREAS, plaintiff and defendant have settled the issue presented in subparagraph F of paragraph VIII of the Complaint and have stipulated that the above named plaintiff shall have partial judgment against defendant;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above named plaintiff recover from defendant State Board of Equalization the sum of $609,969.25, plus interest on said sum to the date of entry of partial Judgment in the above entitled action (which date shall be deemed to be August 1, 1985) in the sum of $737,217.11, for a total sum of $1,347,286.36, plus

interest on said total according to law, with each party to bear its own costs.

Dated: 7-12-85.

/s/ Bertrand D. Moore
BERTRAND D. MOORE
Judge Pro Tempore

Name, Address and Telephone No. of Attorney(s)

Arthur O. Armstrong, E .
Armstrong, Hirsch & Levine
1888 Century Park East, #1888
Los Angeles, CA 90067
Telephone: (213) 553-0305

Attorney(s) for Plaintiff

Space Below for Use of Court Clerk Only C 2 18 5
A: 3 21 54

FILED

JAN 25 1988

FRANK S. ZOLIN, COUNTY CLERK

Anita Jones

BY ANITA JONES, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
(SUPERIOR, MUNICIPAL, or JUSTICE)

(Name of Municipal or Justice Court District or of branch court, if any)

Plaintiff(s)

Williams Brothers Engineering Company, an Oklahoma corporation

Defendant(s)

State Board of Equalization of the State of California

(Abbreviated Title)

CASE NUMBER C 443 028

REQUEST FOR DISMISSAL

TYPE OF ACTION

- ☐ Personal Injury, Property Damage and Wrongful Death
  - ☐ Motor Vehicle
  - ☐ Other
- ☐ Domestic Relations
- ☐ Eminent Domain
- ☒ Other (Specify) Refund of Taxes

TO THE CLERK. Please dismiss this action as follows: (Check applicable boxes)

1. ☐ With prejudice ☒ Without prejudice
2. ☐ Entire action ☐ Complaint only ☐ Petition only ☐ Cross-complaint only
   ☒ Other: (Specify)*

Dismiss entire action without prejudice except for issues presented in subparagraph F of Paragraph VIII of the Complaint which were resolved and settled pursuant to Stipulation for Partial Judgment, previously filed in this action, and the Partial Judgment entered pursuant thereto.

Dated January 22, 1988

*If dismissal requested is of specified parties only, of specified causes of action only or of specified cross-complaints only so state and identify the parties, causes of action or cross-complaints to be dismissed

Attorney(s) for Plaintiff

Arthur O. Armstrong
(Type or print attorney(s) name(s))

TO THE CLERK: Consent to the above dismissal is hereby given.**

Dated

**When a cross-complaint (or Response (Marriage) seeking affirmative relief) is on file, the attorney(s) for the cross-complainant (respondent) must sign this consent when required by CCP 581(1), (2) or (3).

Attorney(s) for

(Type or print attorney(s) name(s))

(To be completed by clerk) JAN 25 1988

- ☐ Dismissal entered as requested on
- ☒ Dismissal entered on as to only
- ☐ Dismissal not entered as requested for the following reason(s), and attorney(s) notified on

JAN 25 1988

Dated

FRANK S. ZOLIN, Clerk

By , Deputy

Form Adopted by Rule 982 of The Judicial Council of California
Revised Effective July 1, 1972

REQUEST FOR DISMISSAL

CCP 581, etc.; Cal. Rules of Court, Rule 1233

EXHIBIT "E"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 473190

WILLIAM BROTHERS ENGINEERING COMPANY,
an Oklahoma corporation, PLAINTIFF

v.

BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA, DEFENDANT

PARTIAL JUDGMENT PURSUANT TO
STIPULATION

[Filed Oct. 16, 1987]

WHEREAS, plaintiff has instituted this action against defendant; and

WHEREAS, plaintiff and defendant have settled the issue presented in subparagraph H of paragraph VIII of the Complaint and have stipulated that plaintiff William Brothers Engineering Company, an Oklahoma corporation, shall have Partial Judgment against Defendant Board of Equalization of the State of California;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff William Brothers Engineering Company, an Oklahoma corporation, recover from defendant Board of Equalization of the State of California the sum of $807,308.16 plus interest on said sum to the date

of entry of Partial Judgment in the above-entitled action (which date shall be deemed to be September 1, 1987) in the sum of $996,934.05, for a total of $1,804,242.21, plus interest on said total sum pursuant to Revenue & Taxation Code § 6936, with each party to bear its own costs.

Dated: Oct. 16, 1987

/s/ John W. Dickey
JOHN W. DICKEY
Judge Pro Tem

A1-3 87 CLNT 10-26-83

Name, Address and Telephone No. of Attorney(s)

Arthur O. Armstrong, E .
Armstrong, Hirsch & Levine
1888 Century Park East, #1888
Los Angeles, CA 90067
Telephone: (213) 553-0305

Attorney(s) for Plaintiff

Space Below for Use of County Clerk Only

FILED

JAN 20 1988

FRANK S. ZOLIN, COUNTY CLERK

Anita Jones

BY ANITA JONES, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
(SUPERIOR, MUNICIPAL, or JUSTICE)

(Name of Municipal or Justice Court District or of branch court, if any)

Plaintiff(s)

Williams Brothers Engineering Company, an Oklahoma corporation

Defendant(s)

Board of Equalization of the State of California

(Abbreviated Title)

CASE NUMBER C 473 190

REQUEST FOR DISMISSAL

TYPE OF ACTION

- ☐ Personal Injury, Property Damage and Wrongful Death
  - ☐ Motor Vehicle
  - ☐ Other
- ☐ Domestic Relations
- ☐ Eminent Domain
- ☒ Other (Specify) Refund of Taxes

TO THE CLERK. Please dismiss this action as follows: (Check applicable boxes.)

1. ☐ With prejudice ☒ Without prejudice
2. ☐ Entire action ☐ Complaint only ☐ Petition only ☐ Cross-complaint only
   ☒ Other: (Specify)*

Dismiss entire action without prejudice except for issues presented in subparagraph H of Paragraph VIII of the Complaint which were resolved and settled pursuant to Stipulation for Partial Judgment, previously filed in this action, and the Partial Judgment entered pursuant thereto.

Dated: January 19, 1988

Attorney(s) for Plaintiff

Arthur O. Armstrong.

(Type or print attorney(s) name(s))

*If dismissal requested is of specified parties only of specified causes of action only or of specified cross-complaints only, so state and identify the parties, causes of action or cross-complaints to be dismissed

TO THE CLERK. Consent to the above dismissal is hereby given.**

Dated:

Attorney(s) for

(Type or print attorney(s) name(s))

**When a cross-complaint (or Response (Marriage) seeking affirmative relief) is on file, the attorney(s) for the cross-complainant (respondent) must sign this consent when required by CCP 581(1), (2) or (5).

(To be completed by clerk)

☒ Dismissal entered as requested on JAN. 20 1988

☐ Dismissal entered on as to only

☐ Dismissal not entered as requested for the following reason(s), and attorney(s) notified on

Dated: JAN. 20 1988

FRANK S. ZOLIN, Clerk

By , Deputy

Form Adopted by Rule 982 of The Judicial Council of California, Revised Effective July 1, 1972

REQUEST FOR DISMISSAL

CCP 581, etc.; Cal. Rules of Court, Rule 1233

ORIGINAL

EXHIBIT "F"

EXHIBIT "G"

BEFORE THE
CALIFORNIA STATE BOARD
OF EQUALIZATION
1020 N Street, Room 102
Sacramento, California

REPORTER'S TRANSCRIPT

JANUARY 8, 1981

PETITION FOR REDETERMINATION

filed by

WILLIAMS BOTHERS ENGINEERING COMPANY
(SR-DHA-22-129377)

PRESENT

For the Board of Equalization:

ERNEST J. DRONENBURG, JR.
Chairman

GEORGE R. REILLY
Vice Chairman

WILLIAM M. BENNETT
Member

RICHARD NEVINS
Member

DOUGLAS D. BELL
Executive Secretary

JANICE MASTERSON
Assistant to Executive Secretary

For the Board of Equalization Staff:

DONALD J. HENNESSY
Staff Counsel

For Petitioner:

ARTHUR ARMSTRONG
Attorney at Law

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[1] MR. DRONENBURG: Okay. That brings us to Williams Brothers Engineering Company. I think we do have Mr. Arthur Armstrong representing the client. Mr. Hennessy, would you present the facts?

MR. HENNESSY: Mr. Chairman, Members of the Board, this is both a petition and a claim for refund by Williams Brothers Engineering Company which is the operator of the Elk Hills Naval Petroleum Reserve.

The main issue is whether Williams Brothers is the consumer of the materials and fixtures they used to improve the real property at the petroleum reserve at Elk Hills.

The Elk Hills Reserve is a joint operation of Standard Oil Company and the United States Navy. The Williams Brothers firm had a contract with the United States Navy, one of the duties under which was to furnish the construction and maintenance of structures and facilities at the reserve.

The land at the reserve is divided into unit land and nonunit land with unit land belonging to both Chevron and the United States Navy and they worked as a unit. The nonunit lands are strictly United States Navy lands.

Prior to October 1, 1977, Williams Brothers was paying tax reimbursement to their vendors when they purchased materials or fixtures to improve the real property.

But, after that time, on instruction or at the request of the United States Navy, they began to issue exemption

certificates on these purchases and the audit imposed use tax directly on Williams Brothers on those types of purchases.

The staff's position here is simply that pursuant to [2] Section 6384, the United States Construction Contractors statute, that Williams Brothers is the consumer of all the materials and fixtures going into the oil wells and structures and other things at this large petroleum reserve.

We do not believe that Williams Brothers was in a position as agent of the United States Government which would make these sales to the United States and therefore exempt from tax under 6381 of the R & T Code.

We do not believe there was the required agency here for two distinct reasons. The first is that although admittedly the contract does contain language to the effect that Williams Brothers is a purchasing agent, in our view, the all important element missing is that the credit of the United States Government does not run to the supply houses that are selling to Williams Brothers.

Rather, in that regard, it is a typical cost reimbursement situation. Williams Brothers would go to the supply houses, purchase the materials and fixtures, and the contract, of course, provided that there will be reimbursement by the Federal Government to Williams Brothers.

Now, under that situation, we don't believe that the magic word agency in there makes this a sale to the United States Government, that the element of federal credit is missing.

This was an important element in the United States Supreme Court case of King and Boozer in which the Alabama tax was upheld with the reason running to the fact you don't have agency unless the Federal Government's credit has run to that [3] supply house. I would also add—

MR. BENNETT: What kind of agency is it; for what purposes other than for credit and whatnot?

MR. HENNESSY: The language is simply as purchasing agent and the rest of the contract is, of course, of a cost reimbursement nature. With that language, we have a hard time actually, Mr. Bennett, pinning down what does not mean if it doesn't mean that the Federal Government is liable to the supply house. They're obviously not and frankly—

MR. BENNETT: I wonder why does the Navy procurement office place it in there then. I guess you have the same problem.

MR. HENNESSY: I have the same problem. One explanation given to us was it gave greater control over the contracting firm. Well, the contract is half an inch or so thick and there are all sorts of elements of control in there, as there are in almost all government cost reimbursement contracts, and I fail to see where these magic words of agency really add anything.

The magic word-description of this agency is something that the Tenth Circuit Court of Appeals has used in upholding the state of New Mexico in going after this same type of tax.

Now, it is not a primary authority now because there is a writ pending before the United States Supreme Court in which the United States, which lost at the Tenth Circuit on this type of agency wording, is asking the United States Supreme Court to review New Mexico's tax.

But we would submit to you the position of New Mexico [4] is very similar to the one of California. You have there a contract in which the word agent or agency or purchasing agent is in the contract and the Federal Government is relying on that to change the nature of the state tax.

MR. BENNETT: Do we have any elements here of the tax really falling upon the sovereign—

MR. HENNESSY: Upon whom?

MR. BENNETT: —Diamond National? Is there any effect such as that here?

MR. HENNESSY: That argument has been made. We do not believe that's the effect because of the lack of a sale to the United States Government. We would see the primary tax here, of course, would be a sales tax on the supply house. But given the exemption certificates, it would then become a use tax on Williams Brothers.

Now, we see that as still one step short of hitting the Federal Government. We would very much see it as an Alabama and King and Boozer-type case which has long been the prime case upholding the state tax in this area.

The second reason we don't believe there is an agency here is one that goes to a policy announced by the Department of Defense in 1955 and it was reaffirmed to this Board in a letter to Mr. Bennett when he was Chairman of the Board in 1976 reaffirming that policy not to designate Department of Defense contractors as agents of the Federal Government.

Now, we have received a letter from the Department of Defense saying that, well, the petroleum reserve was unique. It was a different situation than most situations. [5] Well, this explanation leaves us still with the fact that the Naval Petroleum Reserve was within the purview of the Secretary of the Navy. The United States Code states that the Secretary of the Navy shall administer the reserve under the authority of the Department of Defense. We believe that policy runs through.

Talk of uniqueness frankly has not convinced us that this is anything other than a situation that the Department of Defense told the federal congress in 1955 they would not use an agency clause to avoid state taxes. That is an additional reason why we do not believe this is an invalid type of state tax.

There is a title provision herein which supposedly title to the material and fixtures would run directly to the United States Government. That was also present in the

King and Boozer case when it came before the United States Supreme Court and the court said that regardless of that title provision the contractor is the purchaser.

He's the one liable to the supply house for the charge for the items purchased. Thereore that title provision does not avoid the state tax. We would submit King and Boozer again as authority on that title provision.

MR. BENNETT: Aside from the tax question, is it conceded that title does pass at once to the sovereign?

MR. HENNESSY: I think we concede the title clause is effective in the same sense it was in this King and Boozer situation.

MR. BENNETT: Does that mean that he goes to the [6] supply house and purchases it and that is the property of the United States of America?

MR. HENNESSY: It is under the contract as of the time the federal contractor inspects and approves it, yes. This was a big point in the United States attacking the Alabama tax. They felt this was quite conclusive. The United States Supreme Court didn't. They looked again to who is the purchaser.

MR. BENNETT: Again, this is just thinking aloud. But here he's a designated agent. We say title passes at once on the United States property. The tax is imposed.

MR. NEVINS: Well, he didn't complete his contract with the Federal Government until he actually installed this property into the realty, isn't that right?

MR. HENNESSY: I would agree with that, yes. Absolutely.

MR. BENNETT: That could be so. But you are telling me that regardless of when completed, title passed at the store, the supply house.

MR. HENNESSY: The contract has that provision.

MR. BENNETT: I mean that's what I asked. I said do we concede the contract provision is operative and it does pass title at the supply house.

MR. HENNESSY: I would agree, Mr. Bennett, yes.

MR. BENNETT: Doesn't that make this somewhat more difficult then for us?

MR. HENNESSY: It surely would prior to the King and Boozer case being decided.

MR. BENNETT: Is that King and Boozer case, is that [7] dicta or language on the merits of the case?

MR. HENNESSY: It is language on the merits of the case. In fact, the United States Government was very much pinning their hopes on the very kind of reasoning you are using there when they went before the United States Supreme Court.

The only two further points I would mention are that in the reaudit, there has been a sizable measure allowed to go free of the tax because certain pumps, expensive pumps at the petroleum reserve, were found to be on skids.

They were, in fact, moved quite often according to our auditor. Those have been allowed as machinery and equipment resold to the Federal Government.

My last point would be that the claim for refund here deals with the tax reimbursement paid to the supply houses prior to October 1, '76, when the Navy asked for the change.

The staff's position would be regardless of what happened to the rest of the case that that tax is not refundable directly to the United States Government but would have to come through claims for refund from the vendors who paid the tax to this Board, there being no provision in the administrative process itself for direct refund to the United States Government.

That is basically your staff's position. Mr. Armstrong is here this morning to present the position of Williams Brothers.

MR. DRONENBURG: Mr. Armstrong.

MR. ARMSTRONG: My name is Arthur Armstrong, attorney for Williams Brothers. I'm appearing here at

the direction of [8] the United States Government for Williams Brothers to—

MR. BENNETT: Pardon me. Do you have specific authority to represent the United States of America?

MR. ARMSTRONG: I do not represent the United States of America. I represent Williams Brothers Engineering Company which is instructed as to the steps it's to take but I don't report to the United States Government.

MR. BENNETT: You don't speak for the government?

MR. ARMSTRONG: No, sir, I do not.

MR. BENNETT: Neither do they except for state government.

MR. ARMSTRONG: I speak for neither.

MR. BENNETT: Okay.

MR. ARMSTRONG: If the Board doesn't object, I'll remain seated. I have a back that prefers that posture.

MR. DRONENBURG: Fine.

MR. ARMSTRONG: It also allows me to consult my notes. The basis of this case is set forth in an appallingly thick document that we submitted to Mr. Hennessy sometime back. It's part of the permanent file. Much of the thickness is a series of exhibits and the bulk of the presentation consists of about a 23 page preliminary statement.

I will not repeat those materials nor the other materials in the file. I believe that Mr. Hennessy's various write-ups of this matter have generally been evenhanded except with respect to his conclusions with which we disagree. But I think the factual statements have generally —the written factual statements have generally been acceptable to us.

[9] I would like to make a brief presentation here to acquaint you with the issues as we see them and then Mr. Hennessy and I have discussed the possibility of a supplemental presentation to the Board that will help

sharpen the legal issues in the light of your questions and in light of some concerns that I've expressed to him.

The facts as set forth very briefly are that Williams Brothers Engineering Company has been operating the Elk Hills Petroleum Reserve since 1975 first under the agis of the Secretary of the Navy and since 1977, the latter part of 1977, under the Department of Energy which now has authority over the reserve.

The tax that's here involved was assessed against W.B.E.C. under the authority of Section 6384 of the Revenue and Taxation Code which is a modification of the general rule that sales tax does not apply on sales to the United States Government. That section purports to tax sales to contractors who are purchasing either on their own account or as agents of the United States.

If the items are used in the performance of a contract for the construction of improvements on real property as set forth in our prior statement and in the submission to Mr. Hennessy, we believe that the tax here involved doesn't apply for several reasons, some of which involve construction of the statute and some of which involve constitutionality questions to which Mr. Hennessy and Mr. Bennett were directing most of their attention.

We initially do not—W.B.E.C., as the contract [10] states, and as Mr. Hennessy indicated, contains a clause that when W.B.E.C. purchased under the contract it was purchasing as purchasing agents for the United States Government.

Each of the contracts contain a clause under which procurements are made, contain a clause that the procurement is made on the behalf of, and for the benefit of, the United States Government. Title does pass, as Mr. Hennessy concurred, directly from the vendor to the United States Government. W.B.E.C. never holds title.

I am not authorized to make any statements of law as to the legal liability of the United States Government for procurement under these circumstances. I wish that I

could establish right out that there is no question but that the United States Navy is on the hook.

I can't make that statement. I haven't been authorized to do so. I think it's a question of law that could only be resolved in an action by an unpaid vendor against the United States Government. My understanding is that the government has suffered to some extent from overgenerous commitments of its resources.

MR. BENNETT: As you state the facts, and very well, it seems to me there is a burden on the United States Navy here. Maybe it's a permissible burden. I'm surprised at the result of the case to which Mr. Hennessy referred.

But I would think they might even be here. I guess they don't deign to submit to state jurisdiction. That's why they're not here.

MR. ARMSTRONG: I can't answer that. But I do [11] regard—

MR. BENNETT: We're taxing really the United States property, at least it's the measure of tax. The tax is on you. That's the theory, the reality. Perhaps the—

MR. ARMSTRONG: There is no question that the burden of the tax falls on the United States Government. That's not even an issue. Nobody argues that.

MR. BENNETT: Why isn't this under Diamond National?

MR. ARMSTRONG: That's one of the questions that we regard as directly pertinent.

MR. BENNETT:If a bank can get it—they're usually privately held in this society—it seems to me the—well, anyway, that's my observation.

MR. NEVINS: May I ask a question? Isn't this a device the Navy is using to try to improve their budgetary situation? Isn't that what this is really all about?

MR. ARMSTRONG: I obviously can't answer that since I wasn't present at the birth of the contract. In this particular instance, however, the relationship of

W.B.E.C. to the Elk Hills Reserve is quite different from that of the construction contractor for the United States Government. Ours is purely an administrative role in which—

MR. NEVINS: If the Navy doesn't have to reimburse you for taxes paid to the State of California then either they get more revenue from the oil field or they get less expenditure on their budget. In other words, they can use it for something else. That's really what this boils down to, itsn't it?

MR. ARMSTRONG: Again, I honestly don't know, sir. I [12] do know the contract provisions are regarding the authority of the W.B.E.C. and the nature in which it procures were the subject of intense negotiation and are regarded by the Navy as having substantitve impact over and above the sales tax and, in fact, were negotiated prior to the time of the Diamond National case to which Mr. Bennett referred and without specific reference to that.

They were in the contract before the tax question arose. So I don't think it can fairly be said that the purpose of the clause was a tax purpose. I think it was a business substantive purpose.

MR. NEVINS: The business substantive purpose is to reduce the cost to the Navy.

MR. ARMSTRONG: I don't believe so. As I indicated, at the time the contract was negotiated, for the first approximately three months, as I recall, of activity under the contract, the United States Government authorized W.B.E.C. to reimburse its vendors for the sales tax.

It was not until the Diamond National decision that that policy was reconsidered. So that at the time the contract was negotiated, for whatever reason, the authorities had not taken the position that the sales tax did not apply.

In retrospect, if I were making the decision for them in 1975, as evidenced by the fact we filed a claim for refund, I would disagree with that conclusion. But it's clear they did not have a tax saving motive in mind at the time they drew the contract.

MR. NEVINS: In Diamond National, didn't the banks [13] have a specific statutory relationship to the state that is not present here?

MR. ARMSTRONG: I don't believe the banks have a specific relationship to the state.

MR. NEVINS: Wasn't this statute based, in roughly 1876 or somewhere along in there, that defined very clearly where the banks stood as federal entities?

MR. ARMSTRONG: Well, I think that's true. I don't think anybody's ever questioned where the United States Government stands as a federal entity.

MR. NEVINS: It made these banks a part of the federal apparatus.

MR. ARMSTRONG: In a sense, that's correct. I guess

MR. NEVINS: There is no—your client is not a part of the federal entity. It doesn't have statutory protetcion saying that, well, he's free of taxes because he's delivering mail for me and therefore he can't pay any state or local taxes or some such gimmick as that. There is no such thing as that.

MR. ARMSTRONG: No. You are correct. There is no statute that says a government contractor is exempt from state sales taxes. That is absolutely correct. the issue—

MR. NEVINS: There was one in respect to banks, wasn't there?

MR. ARMSTRONG: Yes, sir. That's correct. The issue in this case is whether W.B.E.C. in its relationship to the United States Government is an independent, taxable entity or whether the tax is, in fact, on the United States.

[14] MR. ARMSTRONG: That's the issue.

MR. NEVINS: The Department of Defense reiterating it in a letter to Mr. Bennett, has said they're going to pay this kind of tax. Isn't that the sense of what the policy is?

MR. ARMSTRONG: There was a policy statement in 1955 to which continuous reference has been made throughout my presentations. I think the only thing I can say in that regard is that the Department of Defense has provided Mr. Hennessy with a letter explaining why the contract refers to us as agent.

Let me concede with you for a moment the Department of Defense or that the—pardon me—the Secretary of the Navy in this contract deviated from that policy. I don't believe they did because their position is that the policy didn't apply to the unusual relationship of the Elk Hills Petroleum Reserve to the government.

The Navy creates an argument, the merits of which I won't go into with you, that it's a unique situation because of its genesis and that's outlined in the presentation he made.

MR. NEVINS: They don't have statutory support for that. That's the critical point.

MR. ARMSTRONG: They claim they do, that the statute creates the Elk Hills Reserve as a different kind of entity than the customary defense establishment. Their position is that it's a unique relationship that is administered by the Secretary of the Navy for Congress. It is not part of D.O.D. as such.

MR. NEVINS: Does the statute you are referring to does that make contractors to the Navy here have some different [15] place then they would be if they were building ships or building a naval airstation in the San Joaquin Valley?

MR. ARMSTRONG: That's the position the Navy has expressed to Mr. Hennesy in the letter of January 10, as I recall.

MR. HENNESSY: January 22.

MR. ARMSTRONG: On January 22, they took that position. What I would say is this, sir, that the Secretary of the Navy executed the contract in 1975. It was approved by President Ford.

I don't know what it takes to countermand or override a policy statement in 1955 but to the extent it can be done they did it. Mr. Hennessy's position has been that the clause is void because of the policy statement.

I don't accept that. I don't—the contract exists. A contreact creates a legal relationship. It says it's an agency relationship as Mr. Bennett and I were discussing.

MR. BENNETT: How could a policy statement interfere with a vested contract right unless both parties to the contract agree?

MR. ARMSTRONG: I concur with you on that. That's our position, that it may well be that whoever executed this contract should be admonished for not having followed the statement.

MR. BENNETT: Policy as a word isn't binding on anybody. It might be policy of a society or government, you know, to punish people that wear brown hats. Unless there is a statute, it's just ineffective policy.

[16] MR. ARMSTRONG: That's our position.

MR. NEVINS: The Secretary of the Navy had this glorious disease of ultra vires. In any event, he still had King and Boozer. He couldn't override King and Boozer—

MR. ARMSTRONG: Obviously he cannot.

MR. NEVINS: —without a statute.

MR. ARMSTRONG: It would take at least a statute, yes. A statute would be sufficient to override King and Boozer.

MR. NEVINS: And there is none that we're aware of.

MR. ARMSTRONG: No, sir. That's correct. There is no statute excluding or making it improper for the state to tax WBEC as in the case of a bank. The question is

whether the tax is, in fact, one on the United States and that is our position.

If I can just go forward, having breached my reputation of conciseness to Mr. Droneburg, one of the elements of the operations at Elk Hills is that W.B.E.C. functions in as broad or as narrow a capacity as the Department of Energy now, the Department of Defense Secretary of the Navy previously, directs.

In some instances, we just purchased goods that are, in fact, installed, and demonstrably installed, by other persons or by the Navy itself. Some of the construction was actually performed by the Navy.

MR. NEVINS: Our records show we didn't tax any of that if it was performed by the Navy tiself.

MR. ARMSTRONG: Mr. Hennessy and I have agreed —his recommendation has been that should not be taxed. I have undertaken to—I believe that we may have failed to provide [17] him with a full data on the exact amount of that.

I'm going to supplement his records with that information. We have agreed that where we are functioning only as a purchasing agent or procurement function that the tax doesn't apply.

There is, on the other end of the spectrum, in some instances, a drilling activity or other activities are being peroformed under the administration of W.B.E.C. and procurements are used in connection with those activities.

It's been our position that even where there is that coincidence that our activity as purchasing agent is separable from our activity as a supervisor of installations. Mr. Hennessy disagreed on that and I accept that and that's the basis of the assessment. Our legal position is, however, that even though our functions are discreet under the contract, there is a middle group of procurement which involves materials that go to warehouses which are to be held and used in subsequent drilling and other activities on the reserve.

Mr. Hennessy's position has been that in those cases as well primarily, as I understand our conversation, because there is high probability they'll be installed under our aegis, that the tax should apply, rather than excluding those on the same basis as the Navy installation situation are excluded.

We believe that in those cases where the procurement is for a warehouse, they are comparable to procurement direct for Navy installation because our actual use of the goods in installation is happenstance and depends on renewal of the contract and so forth. That I think is spelled out in our [18] presentation.

I think, if you will, I will eliminate the statutory construction problem under Section 6384 because Section 6384 only imposes tax if the personal property is purchased by us as a construction contractor.

Our position is that when we are doing these other procurements we're not acting as a construction contractor but as a mere procurement officer.

The other position we have taken and that we believe invalidates the tax is based on the Lockheed decision and then the fact we do not have title to the goods.

Our position is we cannot be subjected to use tax on property that we don't own which is the basis of a substantial portion of the assessment.

MR. NEVINS: You use it, right?

MR. ARMSTRONG: Pardon?

MR. NEVINS: You use it, right?

MR. ARMSTRONG: I guess that sort of states the issue. Some of this equipment that goes into the warehouses—

MR. NEVINS: That's equipment. Let's talk about materials used in the real property.

MR. ARMSTRONG: Fine.

MR. NEVINS: The improvements to real property.

MR. ARMSTRONG: Those are employed by subcontractors in the performance of tasks assigned by the

United States Navy. We have entered into the subcontract. We do not believe we use that equipment, certainly no more so than Lockheed did in its procurements.

[19] That is the government's own material. That is being put into the ground under our administrative supervision. We do not have responsibility for the well.

We have responsibility if we are negligent in our administration or supervision of the drilling but we do not have liability if an act of God, for instance, occurs. That isn't our well. That's the government's well from beginning to end. It is never our well. It is never our equipment.

Our responsibility is that of an admininstrator with no direct liability or responsibility for the materials. So I do not believe that we use that equipment in any sense and certainly we do not have legal title to it.

The final issue that's raised, and was referred to by Mr. Hennessy, I have belabored to some extent already which goes to the position that we are an agent for the United States Government.

To the extent that the statute permits imposition of the tax within this context, we believe that the tax does impermissibly fall on the United States Government, that it is the parties to whom the goods are sold, and that the tax cannot be imposed on the government through an assessment against W.B.E.C.

MR. DRONENBURG: You say Uncle Sam owes the tax.

MR. ARMSTRONG: This is an extraordinarily complex case. It involves an absolutely bewildering array of subissues. I spoke to Mr. Dronenburg before my presentation and I have, as I indicated, made a rather extensive, more or less factual, presentation previously.

[20] I would appreciate the permission of the Board to try to submit a brief that perhaps sharpens these legal issues in the light of the conversations we've had here.

MR. BENNETT: How much time do you want?

MR. ARMSTRONG: I should be able to do that within 30 days.

MR. BENNETT: I so move.

MR. NEVINS: Second.

MR. DRONENBURG: Well, is there a motion to take it under consideration.

MR. NEVINS: That's the motion. I seconded Mr. Bennett's motion.

MR. DRONENBURG: The motion is to—

MR. BENNETT: Is that all, counsel?

MR. ARMSTRONG: That's all I have, sir. I don't believe I can really be helpful by—

MR. BENNETT: What about this? You say you are an agent but you are not an agent for the critical function here to wit, you know, on the credit issue.

MR. ARMSTRONG: I didn't say that, sir. I only said—

MR. BENNETT: Mr. Hennessy said it.

MR. ARMSTRONG: He said that, sure. That I believe is an issue of law that would be decided in light of the contract provisions and of the procurements which are —the forms of which are directed by the responsible government agency, now the DOE. They say the procurement is made on behalf of and for the benefit of the agency.

MR. BENNETT: Is it in the practice or the custom of [21] the supplier to know that the government is the guarantor of these things ultimately?

MR. ARMSTRONG: I can't use the word "guarantor".

MR. BENNETT: That's a loose word. That it stands behind you. That they'll pay if you don't.

MR. ARMSTRONG: I'm not authorized to make a statement on that.

MR. BENNETT: No. Not for the government. Is that as you perceive?

MR. ARMSTRONG: Let me put it this way. If I were a vendor and Williams Brothers went broke, certainly one of the defendants that would come to mind would be the United States Government. There is just no question about that.

MR. BENNETT: On that word agent?

MR. ARMSTRONG: Yes.

MR. BENNETT: Is that all? Just that word agent?

MR. ARMSTRONG: No. Heavens no. On the basis of the provisions in the procurement that say it's made on the behalf of and for the benefit of the United States Government. That's what's in each procurement.

MR. BENNETT: What's in the documents running from you to the supplier?

MR. ARMSTRONG: That's the language I was just using, sir.

MR. BENNETT: Oh. Is that in the file, that document?

MR. ARMSTRONG: Yes, sir. If it isn't, I will find it for you and point it out.

MR. BENNETT: You know, the government purchasing [22] officer is rather meticulous in issuing these things and to whom they extend credit and so on and so forth. It seems to me if they had obligated themselves to the supplier, it would be easy to read where they had done that.

MR. ARMSTRONG: As far as I know, I'm unaware of a case that involves—

MR. BENNETT: I mean right in the document itself because these things are reviewed by large, bureaucratic systems which finally approve it after everybody else does all the work.

MR. ARMSTRONG: Yes, sir. But I would guess as a matter of policy if I were the United States Government, I would not want to concede to you or anybody before the trial that I was liable on these agreements.

MR. DRONENBURG: Okay. We have a motion to take this under consideration—

MR. BENNETT: I so move.

MR. DRONENBURG: —and to allow 30 days for a supplemental brief from Mr. Armstrong. It's been seconded. Hearing no objection, that will be the order. Thank you, Mr. Armstrong.

MR. ARMSTRONG: Thank you for your attention.

EXHIBIT "H"

Article 2. Contractors and Subcontractors

1521. Construction Contractors.

(a) Definitions:

(1) Construction Contract.

(A) "Construction contract" means and includes a contract, whether on a lump sum, time and material, cost plus, or other basis, to:

1. Erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or to real property, or

2. Erect, construct, alter, or repair any fixed works such as waterways and hydroelectric plants, steam and atomic electric generating plants, electrical transmission and distribution lines, telephone and telegraph lines, railroads, highways, airports, sewers and sewage disposal plants and systems, waterworks and water distirbution systems, gas transmission and distribution systems, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, refiners and chemical plants, or

3. Pave surfaces separately or in connection with any of the above works or projects, or

4. Furnish and install the property becoming a part of a central heating, air-conditioning, or electrical system of a building or other structure, and furnish and install wires, ducts, pipes, vents, and other conduit imbedded in or securely affixed to th eland or a structure thereon.

(B) "Construction contract" does not include:

1. A contract for the sale or for the sale and installation of tangible personal property such as machinery and equipment, or

2. The furnishing of tangible personal property under what is otherwise a construction contract if the person

furnishing the property is not responsible under the construction contract for the final affixation or installation of the property furnished.

(2) Construction Contractor. "Construction contractor" means any person who for himself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract. "Construction contractor" includes subcontractors and specialty contractors and those engaged in such building trades as carpentry, bricklaying, cement work, steel work, plastering, drywall installation, sheet metal work, roofing, tile and terrazzo work, electrical work, plumbing, heating, air-conditioning, elevator installation and construction, painting, and persons, installing floor coverings, including linoleum, floor tile, and wall-to-wall carpeting, by permanently affixing such coverings to a floor.

(3) United States Construction Contractor. "United States construction contractor" means a construction contractor who for himself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract for the United States Government.

(4) Materials. "Materials" means and includes construction materials and components, and other tangible personal property incorporated into, attached to, or affixed to, real property by contractors in the performance of a construction contract and which, when combined with other tangible personal property, losses its identity to become an integral and inseparable part of the real property. A list of typical items regarded as materials is set forth in Appendix A.

(5) Fixtures. "Fixtures" means and includes items which are accessory to a building or other structure and do not lose their identity as accessories when installed. A list of typical items regarded as fixtures is set forth in Appendix B.

(6) Machinery and Equipment. "Machinery and equipment" means and includes property intended to be used

in the production, manufacturing or processing of tangible personal property, the performance of services or for other purposes (e.g., research, testing, experimentation) not essential to the fixed works, building, or structure itself, but which property incidentally may, on account of its nature, be attached to the realty without losing its identity as a particular piece of machinery or equipment and, if attached, is readily removable without damage to the unit or to the realty. "Machinery and equipment" does not include junction boxes, switches, conduit and wiring, or valves, pipes, and tubing incorporated into fixed works, buildings, or other structures, whether or not such items are used solely or partially in connection with the operation of machinery and equipment, nor does it include items of tangible personal property such as power shovels, cranes, trucks, and hand or power tools used to perform the construction contract. A list of typical items regarded as machinery and equipment together with a list of typical items not regarded as machinery and equipment is set forth in Appendix C.

(7) Time and Material Contract. "Time and material contract" means a contract under which the contractor agrees to furnish and install materials or fixtures, or both, and which sets forth separately a charge for the materials or fixtures and a charge for their installation or fabrication.

(8) Lump Sum Contract. "Lump sum contract" means a contract under which the contractor for a stated lump sum agrees to furnish and install materials or fixtures, or both. A lump sum contract does not become a time and material contract when the amounts attributable to materials, fixtures, labor, or tax are separately, stated in the invoice.

(b) Application of Tax.

(1) United States Construction Contractors.

(A) Materials and Fixtures. United States construction contractors are consumers of materials and fixtures which they furnish and install in the performance of

contracts with the United States Government. Either the sales tax or the use tax applies with respect to sales of tangible personal property (including materials, fixtures, supplies, and equipment) to contractors for use in the performance of such contracts with the United States for the construction of improvements on or to real property in this state. The fact that the contract may provide principally for the manufacture or acquisition of tangible personal property is immaterial. The sales tax, but not the use tax, applies even though the contractor purchases the property as the agent of the United States.

(B) Machinery and Equipment. United States contractors are retailers of machinery and equipment furnished in connection with the performance of a construction contract with the United States Government. Tax does not apply to sales of machinery and equipment to United States contractors or subcontractors, provided title to the property passes to the United States before the contractor makes any use of it. Such sales are sales for resale, and the purchasing contractor may issue a resale certificate. A contractor who uses the machinery or equipment before title passes to the United States is the consumer of that machinery or equipment and either sales tax or use tax applies with respect to the sale to or the use by the contractor.

(2) Construction Contractors Other than United States Construction Contractors.

(A) Materials.

1. In General. Construction contractors are consumers of materials which they furnish and install in the performance of construction contracts. Either sales tax or use tax applies with respect to the sale of the materials to or the use of the materials by the construction contractor.

2. When Contractor is Seller. A construction contractor may contract to sell materials and also to install the materials sold. If the contract explicitly provides

for the transfer of title to the materials prior to the time the materials are installed, and separately states the sale price of the materials, exclusive of the charge for installation, the contractor will be deemed to be the retailer of the materials.

In the case of a time and material contract, if the contractor bills his customer an amount for "sales tax" computed upon his marked up billing for materials, it will be assumed, in the absence of convincing evidence to the contrary, that he is the retailer of the materials.

If the sale occurs in this state, the sales tax applies to the contractor's (retailer's) gross receipts from the sale of the materials. If the sale occurs prior to the time the property is brought into this state, the contractor's (retailer's) customer is the consumer and his use (unless otherwise exempt) is subject to use tax measured by the sales price. The contractor must collect the use tax and pay it to this state.

(B) Fixtures.

1. In General. Construction contractors are retailers of fixtures which they furnish and install in the performance of construction contracts and tax applies to their sales of the fixtures.

2. Measure of Tax.

a. In General. If the contract states the sale price at which the fixture is sold, tax applies to that price. If the contract does not state the sale price of the fixture, the sale price shall be deemed to be the cost price of the fixture to the contractor.

b. Determining Cost Price. If the contractor purchases the fixtures in a completed condition, the cost price is deemed to be the sale price of the fixture to him and shall include any manufacturer's excise tax or import duty imposed with respect to the fixture prior to its sale by the contractor.

If the contractor is the manufacturer of the fixture, the cost price is deemed to the price at which similar

fixtures in similar quantities ready for installation are sold by him to other contractors.

If similar fixtures are not sold to other contractors ready for installation, then the cost price shall be deemed to be the amount stated in the price lists, bid sheets or other records of the contractor.

If the sale price cannot be established in the above manner and the fixture is manufactured by the contractor, the cost price shall be deemed to be the aggregate of the following:

[1] Cost of materials, including such items as freight-in and import duties,

[2] Direct labor, including fringe benefits and payroll taxes,

[3] Specific factory costs attributable to the fixture,

[4] Any manufacturer's excise tax,

[5] Pro rata share of all overhead attributable to the manufacture of the fixture, and

[6] Reasonable profit from the manufacturing operations, which, in the absence of evidence to the contrary, shall be deemed to be 5 percent of the sum of the preceding factors.

Jobsite fabrication labor and its prorated share of manufacturing overhead must be included in the sale price of the fixture. Jobsite fabrication labor includes assembly labor performed prior to attachment of a component or a fixture to a structure or other real property.

3. Exceptions—Leased Fixtures. In some instances the construction contractor may furnish and install a fixture for a person, other than the owner of the realty, who intends to lease the fixture in place as tangible personal property as provided in Section 6016.3 of the Revenue and Taxation Code and pay tax measured by rental receipts.

In this case the construction contractor may take a resale certificate from the lessor at the time of the transaction and the sale to the lessor will be considered to be a

sale for resale. The resale certificate should indicate that the fixture is purchased for reseal by the purchaser as tangible property under Section 6016.3 of the Revenue and Taxation Code.

(C) Machinery and Equipment.

1. In General. Construction contractors are retailers of machinery and equipment even though the machinery and equipment is furnished in connection with a construction contract. Tax applies to the contractor's gross receipts from such sales.

2. Measure of Tax.

a. In General. Tax applies to the gross receipts from the sale of machinery and equipment furnished and installed by a construction contractor. If the contract calls only for the furnishing and installation of machinery and equipment, tax applies to the total contract price less those charges excludible from gross receipts under Section 6012 of the Revenue and Taxation Code.

b. Lump Sum Contracts—Determining Gross Receipts. If the contract is for a lump sum and includes the furnishing and installation of materials, fixtures, and machinery and equipment, the gross receipts from the sale of the machinery and equipment shall be the price at which similar quantities ready for installation are sold at retail and delivered in the market area where the installation takes place.

If there is no such retail price for the machinery and equipment, then the gross receipts shall be determined from the contracts, price lists, bid sheets, or other records of the contractor.

If the gross receipts cannot be established in the above manner and the machinery and equipment is manufactured by the contractor, the gross receipts from the sale shall be the aggregate of the following:

[1] Cost of materials, including such items as freight-in and import duties,

[2] Direct labor, including fringe benefits and payroll taxes.

[3] Specific factory costs attributable to the machinery or equipment,

[4] Any manufacture's excise tax,

[5] Pro rata share of all overhead attributable to the machinery or equipment, including overhead attributable to manufacturing, selling, contracting, and administration, and

[6] Reasonable profit from the manufacture and sale of the machinery or equipment which, in the absence of evidence to the contrary, shall be deemed to be 5 percent of the sum of the preceding factors.

Jobsite fabrication labor and its prorated share of manufacturing overhead must be included in the sale price of the machinery or equipment. Jobsite fabrication labor includes assembly labor performed prior to attachment of a component or the machinery or equipment to a structure or other real property.

(D) Cost Plus A Fee Contracts. When a contractor enters into a construction contract for a cost plus a fee or time and materials plus a fee, whether the fee is a lump sum or a percentage of costs, the fee is not included in the measure of tax. When the contractor is the manufacturer of the fixtures or machinery and equipment, the "cost price" of the fixtures and the gross receipts from the sale of the machinery and equipment shall be determined in accordance with (B) and (C) above.

(3) Miscellaneous Sales by Contractors. In addition to sales of fixtures and machinery and equipment, tax applies to all retail sales by contractors of tangible personal property, including parts, supplies, tools, contsruction equipment, buildings severed or to be severed by the contractor, and furniture, including furniture sold with a building, even though the building is sold "in place."

(4) Permits. Contractors engaged solely in performing construction contracts which do not involve the sale and

installation of fixtures and who do not also engage in business as sellers or retailers are not required to hold seller's permits. However, if a contractor is a seller or retailer because he makes sales of fixtures, materials, or machinery and equipment, or other tangible personal property either in connection with or as part of a construction contract, or otherwise, he is required to hold a seller's permit.

(5) Supplies and Tools for Self-Use. Contractors are the consumers of supplies such as oxygen, acetylene, gasoline, acid, thread-cutting oil, and tools and parts for tools, which they use in their business, and the tax applies to the sale of such supplies and tools to contractors.

(6) Exemption Certificates.

(A) Resale Certificates. Contractors holding valid seller's permits may purchase fixtures and machinery and equipment for resale by issuing resale certificates to their suppliers. They may not purchase materials for resale unless they are also in the business of selling materials.

A contractor cannot avoid liability for sales or use tax on materials or fixtures furnished and installed by him by taking a resale certificate from the prime contractor, interior decorators, designers, department stores, or others. However, under the circumstances described in subsection (b)(2)(B)3., a contractor may take a resale certificate for fixtures furnished and installed by him for a person other than the owner of the realty.

(B) Exemption Certificates for Out-of-State Use. Sales tax does not apply to sales of tangible personal property to a construction contractor who holds a valid California seller's permit when the property is used by the contractor outside this state in his performance of a contract to improve real property and as a result of such use the property is incorporated into and becomes a part of real property located outside this state. This exemption is available only if at the time of the purchase the contractor certifies in writing to the seller that he holds a valid

California seller's permit (giving the number of that states that the property will be used in the manner stated above. The certificate must be signed by the contractor or an authorized employee. Such a certification may appear in the body of a purchase order which bears the signature of the purchaser. Any certificate given subsequent to the time of purchase will not be recognized.

If the property purchased under a certificate is used by the contractor in any other manner or for any other purpose than stated in the certificate, the contractor shall be liable for sales tax as if he were a retailer making a retail sale of the property at the time of such use, and the sale price of the property to him shall be deemed the gross receipts from the sale.

(C) Deductions for Tax-Paid Purchases Resold. A contractor may claim a "tax-paid purchases resold" deduction for any property of which he is the retailer when he has reimbursed his vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property prior to making any use of it. In the event that the contractor sells short ends or pieces which are not used other than in severing them from larger units purchased by him and as to which he has paid sales tax reimbursement or use tax, he may claim the deduction for tax-paid purchases resold, but the amount of the deduction shall not exceed the price at which he sells such short ends or pieces.

(c) Particular Applications.

(1) Draperies and Drapery Hardware. Persons who contract to sell and install draperies including drapery hardware, such as brackets, rods, tracks, etc., are retailers of the items which they furnish and install. Tax applies to the entire contract price exclusive of the charge for installation which charge should be separately stated. Installers who furnish drapery hardware or other tangible personal property may accept resale certificates from department stores or other sellers to furnish and install the draperies and drapery hardware.

The department stores or other sellers furnishing resale certificates are required to pay the tax to the state upon their selling price of the draperies and drapery hardware, exclusive of installation charges. The installer should segregate his installation charge in order that the department store or other seller may properly segregate its charge attributable to installation for purposes of determining its taxable gross receipts.

(2) Prefabricated Cabinets. A cabinet will be considered to be "prefabricated" and a "fixture" when 90 percent of the total direct cost of labor and material in fabricating and installing the cabinet is incurred prior to affixation to the realty. In determining this 90 percent, the total direct cost of all labor and materials in fabricating the cabinet to the point of installation will be compared to the total direct cost of all labor and materials in completely fabricating and installing the cabinet. If more than one cabinet is fabricated and installed under the contract, each cabinet will be considered separately in determining whether the cabinet is prefabricated.

(3) Prefabricated Buildings. Prefabricated units such as commercial coaches, house trailers, etc., registered with the Department of Motor Vehicles or the Department of Housing and Community Development, are tangible personal property even though they may be connected to plumbing and utilities. A mobilehome which meets or is modified to meet all applicable building codes and regulations and which is permanently affixed to realty is an improvement to realty and is not personal property. Generally portable buildings which merely rest on redwood sills, piers or like property and are attached to realty only through plumbing and utility hookups are personal property.

Prefabricated and modular buildings, other than the type described above, affixed to the realty in a manner indicating that they are intended to remain permanenty or indefinitely in place are improvements to realty for the

purposes of this regulation. It is immaterial whether the buildings are erected upon or affixed to land owned by the owner of the building or are leased to the landowner or lessee of the land.

Prefabricated or modular buildings which are "factory-built housing" where permanently affixed to the realty are improvements to realty. The manufacturer of factory-built housing who contracts to furnish and install the factory-built housing manufactured by him is the consumer of the materials used in building and installing the factory-built housing and the retailer of the fixtures. Tax applies as provided in (b) above.

(4) Mobilehomes Installed for Occupancy as Residences.

Operative July 1, 1980, a special measure of sales or use tax is provided for a mobilehome sold to be affixed to realty for occupancy as a residence.

A mobilehome dealer who sells a new mobilehome to a construction contractor to be affixed to land for occupancy as a residence is the "retailer-consumer" of the property and is required to pay tax for the period in which the sale was made by the dealer measured by an amount equal to 75 percent of the retailer-consumer's purchase price of the mobilehome.

A construction contractor who withdraws a new mobilehome from an inventory purchased for resale to be affixed to realty for occupancy as a residence in the performance of a construction contract is required to pay tax measured by 75 percent of the purchase price by his mobilehome vendor except where the purchase is made directly from a mobilehome manufacturer. In the absence of satisfactory evidence of the vendor's purchase price it shall be presumed that the measure of tax for the transaction is an amount equivalent to 60 percent of the sales price of the mobilehome to the construction contractor.

A mobilehome manufacturer who sells a new mobilehome directly to a construction contractor for installation to real property for occupancy as a residence is required

to pay tax measured by 75 percent of the sales price at which a similar mobilehome ready for installation would be sold by the manufacturer to a retailer-consumer in this state. A construction contractor who withdraws a new mobilehome from an inventory purchased from a manufacturer for resale must pay tax measured by 75 percent of his purchase price.

A mobilehome manufacturer who performs a construction contract by permanently affixing a new mobilehome to real property is the consumer of the material and the retailer of fixtures installed by him and the tax applies as set forth in paragraph (b) above.

Reference should also be made to the provisions of Regulation 1610.2 for additional interpretative rules relating to custom additions to the mobilehome prior to sale, transfers of nonvehicle items, and the application of the tax to a purchase made from an out-of-state retailer.

(5) Repair Contracts. Contracts to repair fixtures are contracts for the sale and installation of parts when the sales price of the parts is billed separately from the repair labor. Tax applies to the sale price of the parts.

A contractor who enters into a lump sum contract to repair a fixture in place or a fixture he is required by the contract to reaffix to the realty is the consumer of parts used.

(6) Elevator Installations. A large number of components are included in the installation of an elevator system. Those portions constituting the cage or platform and its hoisting machinery are fixtures. The balance of the installation, if attached to a structure or other real property will generally be "materials."

Similarly, installation of escalators and moving sidewalks are in part fixtures and in part materials.

Following are examples of components constituting part of the cage or platform and its hoisting machinery, and which are fixtures:

alarm bell
cab or car
car doors
car platform and sling
door hanger on cab
door openers
door operator on cab or car
door safety edge on cab
door sills on cab
electronic door protector
jack assembly
motors
power units and control boxes
pumps
pushbuttons on cab
wire and piping (which are components of a fixture)

Following are examples of components constituting "materials" when attached to realty:

car guides
casing section of jack assembly
guide rails
hoistway doors
hoistway door frames
hoistway door safety edge
hoistway door sills and jambs
hoistway door supports
hoistway entrance
pushbuttons on hoistway
rail brackets
sill, struts
sound insulating panels on "materials"
structural steel (unless part of cab, car, or other "fixture")
valve strainer
wire and piping attached to "materials"

Following are examples of components constituting parts of escalators or moving sidewalks which are fixtures:

staircase
moving sidewalk
moving handrails
chains
sprockets
motors
other operating mechanisms

(7) Telephone Switchboards and Instruments. Telephone switching equipment installed in a building specifically designed to accommodate the equipment or attached to a building or structure in a manner such that its removal would cause damage to the equipment or buliding in which it is installed will be considered to be "fixtures" under paragraph (a)(5) of this regulation.

Telephone handsets, modular switching equipment and standardized, off-shelf, general purpose switching equipment sold for use in general purpose office buildings constitute machinery and equipment under paragraph (a)(6) of this regulation. Handsets, modular switching equipment and standardized equipment were previously classified as fixtures.

This change in classification shall be applied prospectively only with respect to construction contracts entered into on and after July 1, 1988, by contractors other than United States construction contractors.

(8) Deep-Well Agricultural Pumps. A deep-well agricultural pump is tangible personal property if installed so that it rests in position by force of gravity and is not otherwise affixed to the land.

The pump is a fixture if:

(A) It is affixed to the land such as by concrete, bolts or screws,

(B) It is physically connected to an irrigation system such as by pipes or couplings so as to become an integral part of the system, or

(C) It is enclosed by a pump house or other building or structure.

(9) Remote Control Garage Door Openers. Remote control garage door opening units are fixtures. Portable transmitter units furnished pursuant to a construction contract are deemed to be fixtures and are taxable as provided in subdivision (b)(2)(B). Sales of portable transmitter units not a part of a construction contract, as, for example, sales of replacement units, are retail sales of tangible personal property and subject to tax as such.

(10) Excess Reimbursement.

The excess tax reimbursement provisions of Regulation 1700 apply to construction contractors.

APPENDIX A

The following is a list of typical items regarded as materials:

Asphalt
Bricks
Builders' hardware
Caulking material
Cement
Conduit
Doors
Ducts
Electric wiring and connections
Flooring
Glass
Gravel
Insulation
Lath
Lead
Lime
Linoleum
Lumber
Macadam
Millwork
Mortar
Oil
Paint
Paper
Piping, valves, and pipe fittings
Plaster
Power poles, towers, and lines
Putty
Reinforcing mesh
Roofing
Sand
Sheet metal
Steel

Stone
Stucco
Tile
Wall coping
Wallboard
Wallpaper
Wall-to-wall carpeting (when affixed to the floor)
Weather stripping
Windows
Window screens
Wire netting and screen
Wood preserver

APPENDIX B

The following is a list of typical items regarded as fixtures:

Air conditioning units
Awnings
Burglar alarm and fire alarm fixtures
Cabinets, counters, and lockers (prefabricated)
Cranes[1] (including moving parts of cranes) affixed or annexed to a building, structure or fixed work
Electric generators (affixed to and accessory to a building, structure or fixed works)
Elevators, hoists, and conveying units
Furnaces, boilers, and heating units
Lighting fixtures
Plumbing fixtures
Refrigeration units
Signs
Television antennas
Transformers and switchgear
Vault doors and equipment
Venetian blinds

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[1] Moving parts of cranes are classified as machinery and equipment when furnished and installed pursuant to fixed price construction contracts entered into prior to July 1, 1985.

APPENDIX C

The following are lists of typical items regarded as:

Machinery and Equipment

Drill presses
Electric generators (un-affixed, or, if affixed, which meet the requirements of subparagraph (a)(6))
Lathes
Machine tools
Printing presses

Not Machinery or Equipment

Fixtures and materials as defined in this regulation
Wiring, piping, etc., used as a source of power, water, etc., for machinery and equipment
Radio transmission antennas
Large tanks (i.e., over 500 barrel capacity)
Fire alarm systems
Street light standards
Cooling towers other than small prefabricated cooling units

NOTE: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6006-6010, 6012, 6012.2, 6012.8, 6012.9, 6015, 6016, 6016.3, 6016.5, 6055, 6091-6095, 6203.5, 6241-6246, 6276, 6276.1, 6379, 6384, 6386, 6421 and 6901.5, Revenue and Taxation Code. United States Contractors, see Regulation 1618.

HISTORY:

1. Renumbering from former Section 1921 and amendment of subsections (f) and (g) filed 11-3-71; effective thirtieth day thereafter (Register 71, No. 45). For prior history see Register 65, No. 23.
2. Amendment of subsection (g) filed 11-12-71; effective thirtieth day thereafter (Register 71, No. 46).

3. Amendment filed 2-25-76; designated effective 4-1-76 (Register 76, No. 9).
4. Amendment filed 8-20-76; effective thirtieth day thereafter (Register 76, No. 34).
5. Amendment of subsections (a)(3), (b)(1)(A), (b)(1)(B), (b)(6)(C), (c)(7) and (d) filed 1-19-79; effective thirtieth day thereafter. Pursuant to Chapter 1211, Statutes of 1978, the order designates an operative date of 1-1-79 (Register 79, No. 3).
6. Amendment of subsection (c) filed 8-22-80 as an emergency; effective upon filing (Register 80, No. 34). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 12-22-80.
7. Certificate of Compliance including amendment of subsection (b) transmitted to OAL 12-19-80 and filed 1-16-81 (Register 81, No. 3).
8. Amendment of subsections (c)(3), (8) and (9) filed 3-15-84; effective thirtieth day thereafter (Register 84, No. 11).
9. Amendment of subsections (c)(4) and Appendices B and C filed 4-11-86; effective thirtieth day thereafter (Register 86, No. 15).
10. Amendment of subsections (b)(1)(A), (c)(4), (c)(7)-(10) and Appendices B and C filed 6-2-88; operative 7-2-88 (Register 88, No. 24).

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF RICHARD E. NIELSEN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed February 14, 1989)

I, Richard E. Nielsen, declare as follows:

1. I am a Deputy Attorney General employed by the State of California, Department of Justice. As part of my responsibilities I was assigned as the attorney representing the State Board of Equalization in the case of *Williams Brothers Engineering Company* v. *Board of Equalization of the State of California*, Los Angeles County Superior Court number C 443 028, filed on March 23, 1983, and in the case of *Williams Brothers Engineering Company* v. *Board of Equalization of the State of California*, Los Angeles County Superior Court number C 473 190.

2. As a part of the representation of the Board of Equalization I received the attached letters from Williams Brothers' attorney in these two cases, Arthur O. Armstrong:

A. Attached hereto as Exhibit A is a true and correct copy of a letter I received from Arthur O. Armstrong dated March 12, 1987;

B. Attached hereto as Exhibit B is a true and correct copy of a letter I received from Arthur O. Armstrong dated September 10, 1987;

C. Attached hereto as Exhibit C is a true and correct copy of a letter I received from Arthur O. Armstrong dated May 19, 1987;

D. Attached hereto as Exhibit D is a true and correct copy of a letter I received from Arthur O. Armstrong dated January 27, 1988.

3. As a apart of the representation of the Board of Equalization I received a copy of Notice of Motion to File a First Amended Complaint (No. C 443028) which included the Declaration of Arthur O. Armstrong and the Proposed Amended Complaint. Attached hereto as Exhibit E is a true and correct copy of the Notice and included documents.

4. On various dates throughout November 1988, I attempted to obtain a certified copy of the Notice of Motion to File a First Amended Complaint, etc. (No. C 443028) from the files of the Los Angeles Superior Court. Said document was not in the file and a search by court personnel failed to locate said document. Attached hereto as Exhibit F is a certified copy of the Los Angeles Superior Court's docket sheet in Case No. C 443028. The entry on said docket sheet for September 6, 1983 indicates that a Notice of Motion to File a First Amended Complaint, etc. was filed.

5. I have personal knowledge of the foregoing facts and if called and sworn as a witness I could and would competently testify thereto.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California on December 21, 1988.

/s/ Richard E. Nielsen
RICHARD E. NIELSEN

EXHIBIT "A"

LAW OFFICES
ARMSTRONG, HIRSCH & LEVINE
A Professional Corporation
1888 Century Park East
Suite 1888
Los Angeles, California 90067

March 12, 1987

VIA MESSENGER

Richard E. Nielsen, Esq.
Deputy Attorney General
Business & Tax Section
State of California
Department of Justice
3580 Wilshire Blvd., Room 800
Los Angeles, CA 90010

Dear Mr. Nielsen:

Pursuant to our telephone conversation of this morning, I'm enclosing a copy of the Notice of Trial Setting Conference in the Williams Brothers Engineering matter, scheduled for 10:30 A.M. on Wednesday, April 8, 1987, in Department 3. I apologize for not getting this to you in timely fashion--it fell in a crack between the year-end crush and the new-year crush. I very much appreciate your courtesy in confirming that you'll be there. I'll see you then.

In the interim, the Government is to get back to me on the settlement by next Wednesday. I'll let you know as soon as I hear.

Yours very truly,

/s/ A.O.A.
ARTHUR O. ARMSTRONG

AOA:jb
Enclosure
006

EXHIBIT "B"

LAW OFFICES
ARMSTRONG, HIRSCH & LEVINE
A Professional Corporation
1888 Century Park East
18th Floor
Los Angeles, California 90067

September 10, 1987

Richard Nielsen, Esq.
Department of Justice
3580 Wilshire Blvd., Suite 800
Los Angeles, CA 90010

Re: Williams Brothers Engineering

Dear Richard:

I'm returning to you under cover of this letter the original and two executed copies of the Stipulation for Partial Judgment in Case No. C 473190.

As I believe I told you, I have been orally instructed that I am to dismiss both cases. I have not yet, however, received written confirmation of this, and I don't want to actually file the dismissals until that's in hand. I do believe, however, that we should notify the Court that the case ought to be continued past the September 29 date pending filing of the dismissals. Why don't you give me a call with your thoughts on this.

Yours very truly,

/s/ Arthur O. Armstrong
ARTHUR O. ARMSTRONG

AOA:jb
Enclosures
007

EXHIBIT "C"

LAW OFFICES
ARMSTRONG, HIRSCH & LEVINE
A Professional Corporation
1888 Century Park East
Suite 1888
Los Angeles, California 90067

May 19, 1987

Richard Nielsen, Esq.
Deputy Attorney General
State of California
Department of Justice
3580 Wilshire Blvd., Suite 800
Los Angeles, CA 90010

Re: Williams Brothers Engineering

Dear Dick:

To keep you current on this case, the Government is taking a new look at the matter to make a final decision on what it wants. The good news is that the attorney from the Department of Justice who's working on the case now seems to really want to get the matter resolved in an intelligent fashion. I am, for the first time, encouraged.

I'm told that we'll have a final decision before the end of June—and I hope well before then. At that time, if it appears that it will be necessary to go to trial, I will cooperate with you in the development of whatever discovery you think necessary.

Thanks for your continuing cooperations.

Yours very truly,

/s/ A.O.A.
ARTHUR O. ARMSTRONG

AOA:jb
027

EXHIBIT "D"

LAW OFFICES
ARMSTRONG, HIRSCH & LEVINE
A Professional Corporation
1888 Century Park East
18th Floor
Los Angeles, California 90067

January 27, 1988

Richard Nielsen, Esq.
Department of Justice
3580 Wilshire Blvd., Suite 800
Los Angeles, CA 90010

Dear Richard:

This is to confirm to you that the Clerk has entered the Dismissal without prejudice of both of the WBEC cases. For your records I'm enclosing a copy of the materials filed bearing the Clerk's stamp. I'm also enclosing a copy of the Satisfaction of Judgment.

As you know, I have been told that the United States Government intends to institute an action in its own right to obtain a construction of the application of the statute to the operations at Elk Hills. That, I guess, will mean you won't be done with the matter, but I do think that in the long run everyone will benefit from a resolution of the disputes, and that the best party to present the issues is the Government.

Yours very truly,

/s/ A.O.A.
ARTHUR O. ARMSTRONG

AOA:jb
Enclosure
016

cc: Edward Jiran
Department of Energy

Kent Sloan
Williams Brothers Engineering

EXHIBIT "E"

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C443028

WILLIAMS BROTHERS ENGINEERING COMPANY,
an Oklahoma corporation, PLAINTIFF

vs.

BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA, DEFENDANT

NOTICE OF MOTION SEEKING LEAVE TO FILE FIRST AMENDED COMPLAINT, POINTS AND AUTHORITIES IN SUPPORT THEREOF, DECLARATION OF ARTHUR O. ARMSTRONG, AND PROPOSED AMENDED COMPLAINT

Date: September 26, 1983

Time: 9 a.m.

Dept.: 82

TO: All parties and to their attorneys of record:

NOTICE IS HEREBY GIVEN that on Monday, September 26, 1983, at the hour of 9:00 a.m. or as soon thereafter as counsel may be heard in Department 82 of the above entitled court, located at 111 North Hill Street, Los Angeles, California, Plaintiff, WILLIAMS BROTHERS ENGINEERING COMPANY, will move for an or-

der permitting Plaintiff to file a First Amended Complaint attached hereto.

The motion will be made on the grounds that Plaintiff has a valid cause of action against the Defendant arising out of the transaction on which the above entitled action is brought, as more fully appears from Plaintiff's proposed First Amended Complaint attached hereto, and that the Defendant will not be prejudiced by allowing the filing of the amendment at this point in time.

This motion is to be based on this Notice, on the record, pleadings on file herein, on the accompanying Memorandum of Points and Authorities, and on the Declaration in support of the motion.

Dated: 8-31, 1983

/s/ Arthur O. Armstrong
ARTHUR O. ARMSTRONG

POINTS AND AUTHORITIES

I.

THE COURT MAY IN THE FURTHERANCE OF JUSTICE AND ON SUCH TERMS AS MAY BE PROPER ALLOW A PARTY TO AMEND ANY PLEADING.

Code of Civil Procedure, § 473.

II.

COURTS ARE LIBERAL IN ALLOWING AMENDMENTS SO THAT LAWSUITS MAY BE DETERMINED ON THEIR MERITS.

Desny v. Wilder, 46 Cal.2d 715, 751, 299 P.2d 257, 278 (1956)

Klopstock v. Superior Court, 17 Cal.2d 13, 19, 108 P.2d 906, 909 (1941)

Frost v. Witter, 132 Cal. 421, 426, 64 P. 705, 706 (1901)

Barr v. Carrol, 128 Cal. App.2d 23, 26, 274 P.2d 717, 719 (1954)

III.

A COURT IS VERY RARELY JUSTIFIED IN REFUSING A PARTY LEAVE TO AMEND HIS PLEADING TO STATE HIS CASE PROPERLY.

Guidery v. Green, 95 Cal. 630, 633, 30 P. 786, 787 (1892)

Crosby v. Clark, 132 Cal. 1, 8, 63 P. 1022, 1024 (1901).

Marr v. Rhodes, 131 Cal. 267, 270-271, 63 P. 364, 366 (1900)

Tate v. Superior Court, 213 Cal. App.2d 238, 251, 28 Cal. Rptr. 555 (1963)

Saari v. Superior Court, 178 Cal. App.2d 175, 180, 2 Cal. Rptr. 856, 860 (1960)

IV.

IT IS AN ABUSE OF DISCRETION TO REFUSE LEAVE TO AMEND WHERE THE MOTION IS TIMELY MADE AND THE AMENDMENT WOULD BE IN THE FURTHERANCE OF JUSTICE.

Saari v. Superior Court, 178 Cal. App.2d 175, 180, 2 Cal. Rptr. 856, 860 (1960)

Jackson v. Pacific Gas and Electric Co., 95 Cal. App.2d 204, 208, 212-214, 212 P.2d 591, 594 (1949)

V.

PERMITTING AMENDMENT 18 MONTHS AFTER ORIGINAL COMPLAINT IS NOT ABUSE OR DISCRETION IN ABSENCE OF SHOWING OF INJUSTICE OR HARDSHIP.

Bryant v. Wellbanks, 88 Cal. App. 144, 147, 263 P. 332 (1928)

VI.

THE SUPREME COURT OF THIS STATE HAS REPEATEDLY DECLARED THAT GREAT LIBERALITY SHOULD BE SHOWN BY A TRIAL COURT IN PERMITTING, WHERE IT CAN BE DONE WITHOUT WORKING A GREAT DELAY, SUCH AMENDMENTS TO PLEADINGS AS WILL FACILITATE THE PRODUCTION OF ALL FACTS BEARING UPON THE QUESTIONS INVOLVED IN THE ACTION.

San Francisco and Suburban Home Organization v. Leonard, 17 Cal. App. 254, 266, 119 P. 405 (1911)

Dated: 8-31, 1983

/s/ Arthur O. Armstrong
ARTHUR O. ARMSTRONG

DECLARATION OF ARTHUR O. ARMSTRONG IN SUPPORT OF MOTION FOR ORDER GRANTING LEAVE TO FILE FIRST AMENDED COMPLAINT

I, Arthur O. Armstrong, hereby declare the following to be true under penalty of perjury:

I am the attorney for Plaintiff in the action at hand. The original Complaint for Refund of California Sales Tax intentionally omitted any reference to federal grounds as a basis for the Complaint upon instructions from the United States Government, of which Plaintiff is an agent. Due to recent Supreme Court decisions, the United States Goverrment has now authorized Plaintiff to amend the Complaint to raise federal grounds as a basis for the Complaint. The federal grounds have now been included in Paragraph VIII, subparagraph G through I.

The Defendants will not be prejudiced by this Amended Complaint as the original Complaint was filed only six months ago, and the trial is still years away.

Dated: 8-31, 1983, at Los Angeles, California

/s/ Arthur O. Armstrong
ARTHUR O. ARMSTRONG

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Case No. C 443928

WILLIAMS BROTHERS ENGINEERING COMPANY, an Oklahoma corporation, PLAINTIFF

vs.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, DEFENDANT

FIRST AMENDED COMPLAINT FOR REFUND OF CALIFORNIA SALES TAX PAID

[Proposed]

Plaintiff alleges, by leave of court to file this First Amended Complaint:

I.

At all times mentioned herein, Plaintiff, WILLIAMS BROTHERS ENGINEERING COMPANY, is and at all relevant times has been a corporation organized and existing under the laws of the State of Oklahoma, with its principal place of business in Kern County.

II.

Defendant, BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, is, and at all material times herein was, an agency of the State of California charged by law with the duty of administering the California Sales and Use Tax Law.

III.

Jurisdiction of this action is vested in this court under California Code of Civil Procedure § 410.10.

IV.

Venue of this action is properly based in Los Angeles County under California Revenue and Taxation Code § 6933, as the Attorney General has an office in Los Angeles County.

V.

Plaintiff filed California Sales and Use Tax Returns with Defendant when due for the period between November 14, 1975, through December 31, 1977, and Plaintiff timely paid all taxes so reported to Defendant when due.

VI.

Upon audit of Plaintiff, Defendant sent Plaintiff a Notice Of Determination under the Sales and Use Tax Law, dated July 5, 1978, stating that a deficiency in sales and use tax in the amount of $2,932,716.54 plus interest was due for the period commencing November 14, 1975, through December 31, 1977. On August 3, 1978, Plaintiff filed a Petition For Redetermination with Defendant, requesting a hearing. On January 30, 1979, a hearing before Defendant was held. On April 13, 1982, Plaintiff received notice from Defendant of its order that the deficiency in taxes originally determined be reduced by $382,381.68, leaving a balance of tax owed as redetermined of $2,550,334.86 plus interest of $1,468,221.03, for a total of taxes plus interest owed of $4,018,555.89. On or before May 13, 1982, Plaintiff paid said amount to Defendant under protest. On October 1, 1982, Plaintiff filed a Claim For Refund with the Defendant. Defendant denied the Claim For Refund and sent Notice Of Denial Of Claim For Refund on November 22, 1982. This

action is brought within ninety days of the date of such Notice. Accordingly, Plaintiff has exhausted its administrative remedies and now brings this court action under authority of California Revenue and Taxation Code § 6933.

VII.

Said asserted deficiency of $4,018,555.89 for the period commencing November 14, 1975, and ending December 31, 1977, was arbitrarily, erroneously, and illegally determined by Defendant on the basis of grossly incorrect and unwarranted assumptions, and without foundation in fact.

VIII.

The Claim For Refund filed by Plaintiff on October 1, 1982, with Defendant is attached hereto, marked Exhibit "A," and made a part hereof as though set forth in full, except for Paragraph 5.C thereof. In light of the facts set forth in the Claim for Refund incorporated herein, the alleged deficiency as set forth in the Notice of Redetermination, and the taxes collected pursuant thereto, are illegal, erroneous, excessive, and improper in that:

A. If Plaintiff is regarded, contrary to the provisions of the contract, as having acquired materials from vendors and then reselling the materials to the United States Government, such transactions by Plaintiff cannot be subjected to the California sales tax by reason of California Revenue and Taxation Code § 6381.

B. No tax can be assessed against Plaintiff on the authority of California Revenue and Taxation Code § 6384. That section provides only for a sales tax to be imposed on the vendor. If any sales tax were payable on purchases by Plaintiff on behalf of the Government, such tax would be due only by those vendors and could not be assessed against Plaintiff.

C. Further, no tax would be due from Plaintiff or any of the persons who supplied materials to Plaintiff under

California Revenue and Taxation Code § 6384 inasmuch as Plaintiff was not a "construction contractor" within the meaning of that section. This is true as to all of the materials purchased by Plaintiff.

D. Plaintiff cannot be subject to use tax on any of the property purchased by the United States Government through Plaintiff since Plaintiff never held title to any of these items and cannot, therefore, make a taxable "use" of these materials. *Lockheed Aircraft Corp. v. State Board of Equalization*, 81 Cal. App. 3d 257 (1978).

E. No tax was due from Plaintiff or any of those persons who supplied materials to Plaintiff on purchases made by Plaintiff under the contract for the United States Government since Plaintiff was acting solely as an agent for the United States Government, and imposition of a tax on purchases made by the United States Government is prohibited by California Revenue and Taxation Code § 6381.

F. As to the NAVFAC procurements, a refund based on the exclusion of $10,166,154.18 from the measure of the tax should be made.

G. If Plaintiff is regarded, contrary to the provisions of the contract, as having acquired materials from the vendors and then reselling the materials to the United States Government, such transactions by Plaintiff cannot be subject to the California Sales Tax by reason of the United States Constitution.

H. No tax was due from Plaintiff or any of those persons who supplied materials to the Plaintiff on purchases made by Plaintiff under the contract for the United States Government since Plaintiff was acting solely as an agent of the United States Government, and imposition of a tax on purchases made by the United States Government is prohibited by the United States Constitution.

I. The application of the California Sales and Use Tax to the purchase of materials by the United States

Government under California Revenue and Taxation Code § 6384 would discriminate against the Government and those doing business with it, in that the basis of the tax is different from that applicable to contractors doing business with private parties and with California governmental entities.

WHEREFORE, Plaintiff prays for judgment against Defendant

(1) in the amount of $4,018,555.89 and such other amounts to which Plaintiff may be entitled,
(2) for interest allowable by statute,
(3) for cost of suit hereof, and
(4) for such other and further relief as this court may deem just and proper.

Date: 8-31

ARMSTRONG, HENDLER & HIRSCH
A Professional Corporation

By: /s/
Attorneys for Plaintiff

SMM: 9-H

October 1, 1982

State Board of Equalization
1020 North Street
Sacramento, California 95814

Attention: Refund Unit

Re: *Claim for Refund, California Sales Tax Matter*

Gentlemen:

Williams Brothers Engineering Company ("Taxpayer" or "WBEC") herein, the person against whom the determination described below was made, on behalf of itself and the United States Government, the real party in interest, respectfully submits the following Claim for Refund ("Claim"):

1. *Identification of Taxpayer.*

Williams Brothers Engineering Company
P.O. Box 86
Tupman, California 93276

2. *Periods Involved.*

November 14, 1975, through December 31, 1977

3. *Prior Proceedings.*

Taxpayer filed a Petition for Redetermination (the "Petition"), and a hearing was held by the State Board of Equalization. A Notice of Redetermination, attached as Exhibit 1, dated April 13, 1982, was served on Taxpayer. Taxpayer timely paid the alleged deficiency. This Claim is filed within 6 months of the date of such payment.

4. *Refund Claimed.*

A refund is claimed for the entire amount paid as above set forth, in the amount of $2 550,334.86, together with interest as provided by law.

5. *Grounds for Refund.*

5.A *Factual Background.*

This claim for refund is filed as required by Section 6932 (all section references, unless otherwise indicated are to the California Revenue and Taxation Code) for the purpose of exhausting Taxpayer's administrative remedies in order that the issues here involved can be tested through appropriate litigation. The factual matters upon which the Claim is based, and many of the legal arguments, have been the subject of extensive submissions to the Board of Equalization in connection with the Petition. Taxpayer hereby incorporates by reference the factual submission designated "Preliminary and Jurisdictional Statement", which included copies of all of the relevant documents, submitted to Mr. D. J. Hennessey at a Staff Hearing on January 30, 1979, and the Supplemental Brief submitted to the Board of Equalization following the hearing before it on January 8, 1981.

As set forth in those materials, Petitioner entered into a contract with the United States Government, through the Secretary of Navy (now the Secretary of Energy pursuant to P.L. 95-91), dated October 13, 1975. For convenience, an additional copy of that contract is appended hereto as Exhibit 2.

Pursuant to the said Contract, Petitioner, acting on behalf of the United States Government and not in its own right, negotiated with various suppliers to provide articles of tangible personal property to be used by the United States Government in work being conducted at Elk Hills. Under the terms of the Contract with the United States Government, Petitioner never had title to

any of such materials, and did not become the beneficial owner of any interest therein. Title thereto passed directly from the various vendors to the United States Government pursuant to the provisions of the Contract, and of various agreements with vendors which were negotiated by Petitioner on behalf of the United States Government.

The materials acquired by the United States Government through WBEC were, in general, ultimately used in the construction of improvements to the Elk Hills facilities.

In some cases, installation of the materials in connection with projects was administered by WBEC. In that capacity, WBEC has the responsibility of hiring a subcontractor designated by the United States Government to complete installation of the material. WBEC did not, however, have responsibility for the job or for completion of the installation. Its function was solely that of servicing the administration of the contract, and not of a construction contractor.

Certain materials acquired by the United States Government through WBEC were placed in inventory. From inventory, they were drawn on as needed for installation in various projects at Elk Hills, Some of these projects were ones administered by other contractors; some of them were administered by WBEC.

In both of these cases, it is WBEC's position that it was not a "construction contractor" within the meaning of Section 6384. The conclusion to the contrary set forth in the Notice of Redetermination is erroneous.

5.B *Special Item: The NAVFAC Procurements.*

The Board, in its Notice of Redetermination, and throughout these proceedings, has apparently agreed that amounts reflecting the cost of materials purchased through WBEC which were installed by the Naval Facilities Command ("NAVFAC"), on the LTS#1 Plant and the High

Pressure Injection Plant should be excluded from the measure of the tax, since WBEC's only function as to these procurements relates to purchasing, and WBEC is not the "construction contractor" within the meaning of Section 6384 as to these procurements.

Despite this agreement on the legal issues the measure of the tax set forth in the Notice of Redetermination does not exclude the cost of materials procured for these projects on the grounds that "documentation necessary to delete" these purchases had not been submitted.

There is attached as Exhibit "3" a Summary setting forth the amount of these procurements improperly included in the measure of the tax, aggregating $10,166,154.18. The invoices described thereon are not submitted here since their bulk renders such a submission impractical. They are, however, available at the offices of the Taxpayer for review and audit.

5.C *Legal Basis for Refund.*

In the light of the foregoing, the alleged deficiency as set forth in the Notice of Redetermination, and the taxes collected pursuant thereto, are illegal, erroneous, excessive and improper in that:

A. If WBEC is regarded, contrary to the provisions of Contract as having acquired materials from vendors, and then reselling it to the United States Government, such transactions by WBEC cannot be subjected to the California sales tax by reason of the United States Constitution and Section 6381.

B. No tax can be assessed against WBEC on the authority of Section 6384. That Section provides only for a sales tax to be imposed on the vendor. If any sales tax were payable on purchases by WBEC on behalf of the Government, such tax would be due only by those vendors, and could not be assessed against WBEC.

C. Further, no tax would be due from WBEC or any of the persons who supplied materials to WBEC under

Section 6384 inasmuch as WBEC was not a "construction contractor" within the meaning of that section. This is true as to all of the materials purchased by WBEC.

D. WBEC cannot be subject to use tax on any of the property purchased by the United States Government through WBEC since WBEC never held title to any of these items and cannot, therefore, make a taxable "use" of these materials. *Lockheed Aircraft Corp. v. State Board of Equalization*, 81 Cal.App. 3d 257 (1978).

E. No tax was due from WBEC or any of those persons who supplied materials to WBEC on purchases made by WBEC under the contract for the United States Government since WBEC was acting solely as an agent for the United States Government, and imposition of a tax on purchases made by the United States Government is prohibited by the Constitution of the United States, and by Section 6381.

F. The application of the California Sales and Use Tax to the purchase of materials by the United States Government under Section 6384 would discriminate against the Government and those doing business with it, in that the basis of the tax is different from that applicable to contractors doing business with private parties and with California governmental entities.

G. As to the NAVFAC procurements, a refund based on the exclusion of $10,166,154.18 from the measure of the tax should be made.

6. *Communications.*

It is respectfully requested that copies of all future notices and correspondence be sent to Taxpayer's representative:

Arthur O. Armstrong, Esq.
Armstrong, Hendler & Hirsch
1888 Century Park East, Suite 1888
Los Angeles, California 90067

Telephone: (212) 553-0305

Executed at Elk Hills, California, on this 7th day of October, 1982.

WILLIAMS BROTHERS
ENGINEERING COMPANY

By: /s/ C. H. Barfield
C. H. BARFIELD
General Manager

VERIFICATION

I am an officer of the Plaintiff in the above entitled proceeding; I have read the foregoing First Amended Complaint and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on August 31, 1983 at Elk Hills, California.

/s/ Raymond C. Harbert
RAYMOND C. HARBERT
Vice President
Title

SUPERIOR COURT LOS ANGELES COUNTY C 443028

WILLIAMS BROS ENGR CO — ARMSTRONG-HENDLER-HIRSCH

CALIF EQUAL BD

John K. Van De Kamp

NATURE OF ACTION: MISC CIVIL COMPLAINT-MONEY INVOLVED — CODE: 0601

REPORTER

REPORTER

YEAR	MONTH	DAY	PROCEEDINGS	FILED DOC	FEES
1983	FEB	18	COMPLAINT FILED AND SUMMONS ISSUED	1	92.00
83	3	23	Dept Board of Equalization of the State of Calif Kamp	2	
83	9	6	Pltf's mot for leave to file 1st Amended Compl 11-15-83 9 AM D82	3	14
83	10	7	D's & A's in oppo to Mot seeking leave to file first amended compl	4	
83	11	15	Hrg cont 12-29-83 9 AM D82		
83	10	19	Ntc of Hearing on Dem to Amended Compl 11-15-83 9 A.M D82	5	12
83	12	29	Dem o/c	6	
84	1	9	P's & D's in oppo to Dem to amended compl	7	
84	1	23	Hrg to be held on Dem		
84	3	5	P's Mot for Leave to file 2nd Amended Compl & Proposed 2nd Amended Compl & Order 3-26-84 9 AM D82	8	14
84	3	26	Stip to file 2nd amd Compl + Ord	9	
84	3	30	Mo granted re ARB	10	
1984	May	27	FILED		
84	05	29	ARBITRATION CONFERENCE SET Aug 15 84 10:30 am D3	11	
84	8	15	STIPULATE NOT TO ARBITRATE 14-3	12	
85	8	12	Partial Judgment Pursuant to Stip. D-1A	13	
85	8	12	Stip. for Partial Judgment D-1A	14	
85	9	30	Ack & Rec Partial Status of Judgt	15	
86	1	25	REQUEST FOR ENTRY OF DISMISSAL FILED		
86	1	25	DISMISSED BY ATTY FOR PLFF w/out pre; except for issues in Compl Cmp Rvsd pt 1		

EXHIBIT "F"

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF ROBERT D. MILAM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed February 14, 1989)

I, Robert D. Milam, declare as follows:

1. I am an attorney licensed in the State of California and in the United States District Court, Eastern District of California. I am employed by the State of California Department of Justice as a Deputy Attorney General. Part of my overall responsibility is to represent the defendants in the above-entitled case.

2. As part of my duties in this case I served upon plaintiffs a request for production of documents. Attached hereto as exhibit A is a true and correct copy of the request.

3. Plaintiff United States of America responded to my request for production of documents. Attached hereto as exhibit B is a true and correct copy of its written response.

4. As part of the production of documents, the United States sent me the following documents:

A. Copies of orders placed with third party suppliers by WBEC for each year of the contract. Attached hereto as exhibit C are true and correct copies of two such orders.

B. A copy of a modification of WBEC's contract with plaintiff in which the term "prime contractor" is substituted for the words "agent" and/or "purchasing agent". Attached hereto as exhibit D are true and correct copies of a cover letter and two pages from the contract modification.

C. A copy of modification of WBEC's contract with the United States which established the terms and conditions of WBEC's responsibilities during the "post-operation" period, the period during which WBEC would finish its contract obligations and prior to the time a new contractor would assume responsibility. Attached hereto as exhibit E are true and correct copies of a portion of these modifications relating to the United States government's payment of attorney's fees in the WBEC state court cases.

5. I have personal knowledge of the foregoing facts and if called and sworn as a witness I could and would competently testify to those facts.

Executed at Sacramento, California on February 13, 1989.

/s/ Robert D. Milam
ROBERT D. MILAM

EXHIBIT "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIV. S-88-600-LKK-EM

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF CALIFORNIA, and CALIFORNIA BOARD OF EQUALIZATION, DEFENDANTS

REQUEST FOR PRODUCTION OF DOCUMENTS

TO PLAINTIFF AND ITS ATTORNEY OF RECORDS:

You are hereby requested by defendant to produce the following documents in accordance with Rule No. 34 of the Federal Rules of Civil Procedure. The documents shall be produced at the Office of the Attorney General, 1515 K Street, Room 305, Sacramento, California or mailed ot Post Office Box 944255, Sacramento, California 94244-2550, Attn: Robert D. Milam, on November 14, 1988 at 10:00 a.m.

REQUEST NO. 1

The Unit Plan Contract between Standard Oil Co. of California (now Chevron U.S.A., Inc.) and the names as described in paragraph 9 of the Complaint.

REQUEST NO. 2

All Contracts described as management and operating contracts as described in paragraphs 10 and 11 of the Complaint between the United States and WBEC.

REQUEST NO. 3

U.S. Department of the Treasury For Financial Institutions to Receive Federal Funds Under Check-Paid Technique in a Letter of Credit—Treasury Financial Communications System as described in your response to Defendant's Interrogatory No. 20.

REQUEST NO. 4

Copies of two of the orders placed with third party suppliers by WBEC for each year of the contract.

Dated: October 14, 1988.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General
of the State of California

ROBERT F. TYLER
Supervising Deputy Attorney General

/s/ Robert D. Milam
ROBERT D. MILAM
Deputy Attorney General

Attorneys for Defendants

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-88-600 LKK-EM

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA; and CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS

PLAINTIFF'S RESPONSE TO DEFENDANT'S REQUEST FOR PRODUCTION OF DOCUMENTS

The plaintiff, the United States of America, responds to the defendants' request for production of documents as follows:

REQUEST FOR PRODUCTION NO. 1:

The Unit Plan Contract between Standard Oil Co. of California (now Chevron U.S.A., Inc.) and the names as described in paragraph 9 of the Complaint.

RESPONSE TO REQUEST NO. 1:

Copies of the Unit Plan Contract and the Amendatory and Supplemental Agreement are attached hereto as Exhibits A and B, respectively.

REQUEST FOR PRODUCTION 2:

All Contracts described as management and operating contracts as described in paragraphs 10 and 11 of the Complaint between the United States and WBEC.

RESPONSE TO REQUEST NO. 2:

Copies of the Navy/WBEC and Department of Energy/WBEC contracts are attached hereto as Exhibits C and D, respectively.

REQUEST FOR PRODUCTION NO. 3:

U. S. Department of the Treasury For Financial Institutions to Receive Federal Funds Under Check-Paid Technique in a Letter of Credit—Treasury Financial Communications System as described in your response to Defendant's Interrogatory No. 20.

RESPONSE TO REQUEST NO. 3:

A copy of the Treasury procedures for letters-of-credit is attached hereto as Exhibit E.

REQUEST FOR PRODUCTION NO. 4:

Copies of two of the orders placed with third party suppliers by WBEC for each year of the contract.

RESPONSE TO REQUEST 4:

Samples of the purchase orders requested are attached hereto as Exhibit F.

DATED: November 22, 1988.

Respectfully submitted,

DAVID F. LEVI
United States Attorney

YOSHINORI H. T. HIMEL
Assistant United States Attorney

WILLIAM S. ROSE, JR.
JOHN J. MCCARTHY
RICHARD A. CORREA
Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 227
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 724-6555

By: /s/ John J. McCarthy
JOHN J. MCCARTHY
Attorneys for Plaintiff,
United States of America

EXHIBIT "C"

WILLIAMS BROTHERS ENGINEERING CO.
OPERATOR
NAVAL PETROLEUM RESERVE NO. 1
Contract NOd 10068
P.O. Box 86
Tupman, CA. 93276

PURCHASE ORDER/ RECEIVING & SHIPPING REPORT

Certified for National Defense under DMS and/or DPS Regulation No. 1 Rating: DO-C-9.

PURCHASE ORDER NO. E-20018 DATE 6/8/76 PAGE 1 OF 1

REV. _____ TOTAL L/I: _____ VENDOR NO. _____

ACCT. CODE _____ CHARGE NO. Carneros WELL NO. _____

JOB NO. _____ SUB. ACCT. _____ P.O. AMT. $135,470.65

ALTERNATE COST DISTRIBUTION	ACCT. CODE	CHARGE NO.	WELL NO.

VERIFIED BY: _____

TO:
Equipment Renewal Co.
300 Metro Bank Bldg.
Denver, Colo. 80202

SHIP TO:
Williams Brothers Engineering Co.
Naval Petroleum Reserve No. 1
Elk Hills, CA

FOR INFORMATION CONTACT:
Bill Carroll WC
TEL: (805) 763-4131 EXT.: 356

DISCOUNT TERMS: Net 30 days

F.O.B.: Bakersfield, CA

METHOD OF SHIPMENT: Best Way

SHIPPING POINT:

SUBMIT INVOICES: *(Original and one copy unless otherwise specified) to Williams Brothers Engineering Co., ATTN: Controller, P.O. Box 86, Tupman, CA. 93276. PURCHASE ORDER NUMBER shown above must be indicated on all invoices, shipping papers, and correspondence. State discount terms of payment on invoices. Cash discount period to commence with date of receipt of material or upon receipt of invoice, whichever is later. No charge for packing, loading, or drayage will be allowed unless expressly provided in this order.*

SCHEDULE								RECEIVING AND SHIPPING		
ITEM	QUANTITY ORDERED	UNIT	DESCRIPTION	C/D	UNIT PRICE	AMOUNT	DELIVERY DATE	QUANTITY RECEIVED	AMOUNT	DEBD
1	5	ea.	Wellhead Assembly, Dual Completion, 5000# PSI in accordance with our Specifications on RFP E-20018 and your Response to same dated May 18, 1976.		$26,352.13	$131,760.65	As Requested			
			Plus Freight from Houston		742.00	3,710.00				
			Field Services are to be in accordance with your stated charges on file with us and part of your quotation of May 18, 1976 (Service Charges dated November 25, 1975)		27,094 13	$135,470.65				
			Show purchase order number on all shipping documents and invoices.							
			CONFIRMING TO BILL STARK					N. Cavaleri		

Your offer is hereby accepted as to the line items listed above and on any continuation sheet(s). The request for proposal (RFP), if any, and such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein are a part of this order.

WILLIAMS BROTHERS ENGINEERING CO.

BY R.C. Harbert
AUTHORIZED REPRESENTATIVE

TO BE VALID THIS PURCHASE ORDER MUST ☐ NEED NOT BE ☐ APPROVED BY THE NAVY AUTHORIZED REPRESENTATIVE.

OFFICER-IN-CHARGE, NAVAL PETROLEUM RESERVE NO. 1

REC'D DATE ___ ___

R & I NO.

SHIPPED BY:	BILL OF LADING NO.	NO. PIECES	WEIGHT	ROD

I certify that the services herein were satisfactorily completed, or the articles specified herein have been inspected both as to condition and quantity and have been accepted as satisfactory or rejected as indicated above.

C

BY _____
WILLIAMS BROTHERS ENGINEERING CO.

WILLIAMS BROTHERS ENGINEERING CO.
OPERATOR
NAVAL PETROLEUM RESERVE NO. 1
Contract NOd 10068
P.O. Box 86
Tupman, CA. 93276

PURCHASE ORDER/ RECEIVING & SHIPPING REPORT

Certified for National Defense under DMS and/or DPS Regulation No. 1 Rating: DO C-9.

FOR INFORMATION CONTACT: Bill Carroll WF
TEL: (805) 763-4131 EXT.: 356

DISCOUNT TERMS: 20th Prox
F.O.B.: Destination
METHOD OF SHIPMENT:
SHIPPING POINT:

PURCHASE ORDER NO. E-40003 DATE 6/24/76 PAGE 1 OF 1

REV. _____ TOTAL LI: _____ VENDOR NO. 352-242, 327-2
ACCT. CODE _____ CHARGE NO. _____ WELL NO. 326-31S, 322
JOB NO. _____ SUB. ACCT. _____ P.O. AMT. $116,832.04

	ACCT. CODE	CHARGE NO.	WELL NO.
ALTERNATE COST DISTRIBUTION			

VERIFIED BY: _____

TO:
National Supply Company
Division of ARMCO Steel Corporation
P.O. Box 829
Long Beach, CA 90800

SHIP TO:
Williams Brothers Engineering Co.
Naval Petroleum Reserve NO. 1
Elk Hills, CA

SUBMIT INVOICES: (Original and one copy unless otherwise specified) to Williams Brothers Engineering Co., ATTN: Controller, P.O. Box 86, Tupman, CA. 93276. PURCHASE ORDER NUMBER shown above must be indicated on all invoices, shipping papers, and correspondence. State discount terms of payment on invoices. Cash discount period to commence with date of receipt of material or upon receipt of invoice, whichever is later. No charge for packing, loading, or draying will be allowed unless expressly provided in this order.

SCHEDULE

ITEM	QUANTITY ORDERED	UNIT	DESCRIPTION	C/D	UNIT PRICE	AMOUNT	DELIVERY DATE	RECEIVING AND SHIPPING: QUANTITY RECEIVED	AMOUNT	CODE
1	4	ea.	Dual Xmas Tree and Tubing Head assembly in accordance with our RFP-E-40003 dated 6-8-76 and your response dated 6-17-76. Item 6 will be changed to read: WKM Safety-Guard Pneumatic Actuator. A substitution of an R-45 Ring Gasket is acceptable instead of an RX Ring. Show purchase order number on all shipping documents and invoices. Equipment should be assembled and tested at Vendors Warehouse and stored there until needed. CONFIRMING TO GENE WOOD		$29,208.01	$116.832.04	1 in Bal.	3 weeks 5 weeks		

N. Cavaleri

Your offer is hereby accepted as to the line items listed above and on any continuation sheet(s). The request for proposal (RFP), if any, and such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein are a part of this order.

WILLIAMS BROTHERS ENGINEERING CO.

R.C. Harbert

BY _____
AUTHORIZED REPRESENTATIVE

TO BE VALID THIS PURCHASE ORDER MUST ☐ NEED NOT BE ☐ APPROVED BY THE NAVY AUTHORIZED REPRESENTATIVE.

OFFICER-IN-CHARGE, NAVAL PETROLEUM RESERVE NO. 1

SHIPPED BY:	BILL OF LADING NO.	NO. PIECES	WEIGHT	ROD

REC'D DATE ____ ____

R & I NO.

I certify that the services herein were satisfactorily completed, or the articles specified herein have been inspected both as to condition and quantity and have been accepted as satisfactory or rejected as indicated above.

BY _____
WILLIAMS BROTHERS ENGINEERING CO.

DEPARTMENT OF THE NAVY
NAVAL PETROLEUM RESERVES IN CALIFORNIA
POST OFFICE BOX 11, TUPMAN, CALIFORNIA 93276
TELEPHONE (TAFT, CALIF.) 763-4131

NOd-10068
4330.1-8
Serial: 1534
29 JUN 1977

From: Officer in Charge, Naval Petroleum Reserves in California
To: General Manager, WBEC, UO-NPR #1

Subj: Change Order P-00012 to Contract NOd-10068

Ref: (a) Operator's Contract NOd-10068
(b) Change Order P-00012 to NOd-10068, effective 22 Jun 77

1. Reference (a) has been changed by reference (b) to delete the words "purchasing agent" from Section IV(e)(7) of reference (a).

2. Accordingly, effective immediately, no subcontracts or purchase orders shall be awarded by WBEC, in its capacity as Operator, which either state or imply that WBEC is acting as the "purchasing agent" or "agent" of the U.S. Government. Further, all potential bidders on all existing RFP's shall be notified that WBEC is acting as the prime contractor and not as an agent for the Government and any reference to WBEC as the "agent" of the Government shall henceforth be deleted from all future RFP's.

R. G. MARTIN

Copy to:
Operating Committee, UO-NPR #1
DNPR

RECEIVED
JUN 29 1977
UO-NPR #1

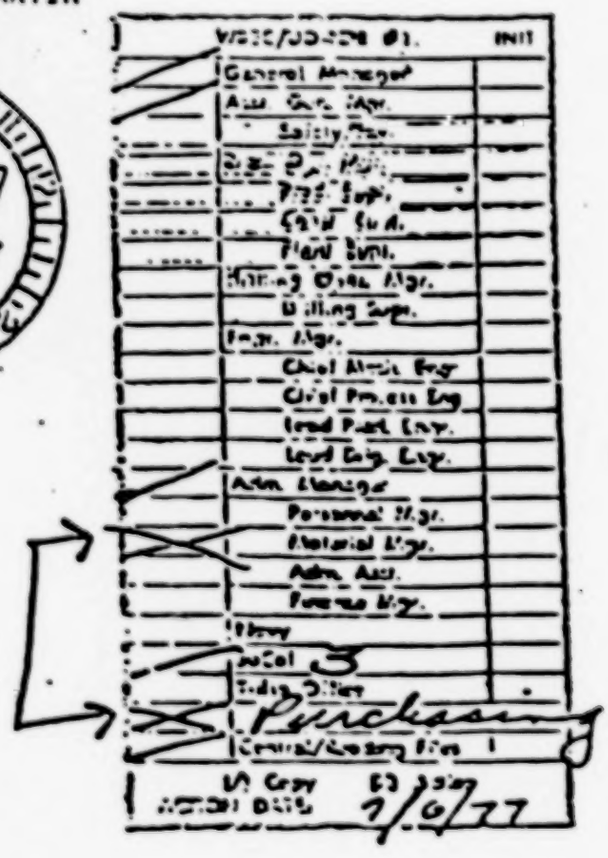


EXHIBIT "D"
127

RECEIVED JUL 8 1977

TELEPHONE (TAFT, CALIF.) 763-4131

4330.1-B
Serial: 1615
8 JUL 1977

From: Officer in Charge, Naval Petroleum Reserves in California
To: General Manager, WBEC, UO-NPR #1

Subj: Contractor's Implementation of Modification P00012, Contract NOd-10068

Ref: (a) WBEC ltr of July 6, 1977
(b) Change Order P-00012 to Contract NOd-10068, effective June 22, 1977

1. Reference (a) outlines the WBEC suggested changes to subcontract and purchase order terms and conditions, as well as RFP's, in compliance with reference (b). These changes would amend Article I of the various types of subcontracts, purchase orders and RFP's by substituting the words "prime contractor" for the words "agent" and/or "purchasing agent."

2. While the change recommended in reference (a) will provide that WBEC is the government's prime contractor, Article I, without the deletion of the phrase which indicates payment will be made on behalf of the government, would nevertheless suggest the continued existence of an agency relationship. Therefore, any reference therein to the effect that payment is made on behalf of the government shall be deleted as well.

3. Consent will be given to those procurements currently under review, with the understanding that the Operator will substitute proper terms and conditions not inconsistent with the above, before sending the procurement to the supplier for signature.

4. Since the Purchasing Department incorporates the terms and conditions by reference, and not as an enclosure, each current supplier should be notified of these changes in writing, before any further purchases are made, and should be forwarded copies of the revised terms and conditions. It is strongly recommended that WBEC refrain from inviting any supplier, subcontractor, etc., to consider a change in price. Further, submission of procurements to NPRC for approval should not be held in abeyance pending response to such notification.

R. G. MART

Copy to:
Operating Committee, UO-NPR #1
DNPR (041)

STANDARD FORM 30, AUG 1980
GENERAL SERVICES ADMINISTRATION
FAR (48 CFR) 53.243

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

PAGE 1A OF 36

1 AMENDMENT/MODIFICATION NO.	2 EFFECTIVE DATE	3 REQUISITION/PURCHASE REQUEST NO.	4 PROJECT NO. (If applicable)
M051	See Blk 19	01-HSRA32104-.006	

5 ISSUED BY	CODE	6 ADMINISTERED BY (If other than Item 5)	CODE
U.S. Department of Energy Office of Procurement Operations 1000 Independence Avenue, S.W. Washington, D.C. 20585	MA-453.1	U.S. Department of Energy Naval Petroleum Reserves in California P.O. Box 11 Tupman, CA 93276	

7 CONTRACTOR CODE / FACILITY CODE
NAME AND ADDRESS

Williams Brothers Engineering Company
ATTN: Raymond C. Harbert
6600 South Yale Avenue
Tulsa, OK 74117

(Street, city, county, state, and ZIP Code)

8
☐ AMENDMENT OF SOLICITATION NO. _____
DATED _____ (See Item 9)
☒ MODIFICATION OF CONTRACT/ORDER NO. DE-AC01-80RA32049
DATED 9/30/80 (See Item 11)

9 THE ABOVE APPLIES ONLY TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 13. The hour and date specified for receipt of Offers ☐ is extended ☐ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By signing and returning _____ copies of this amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

10 ACCOUNTING AND APPROPRIATION DATA (If required)

N/A

B/NC- B133

11 THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS

A. ☐ This Change Order is issued pursuant to: _____
The Changes set forth in Item 13 are made in the above numbered contract/order.

B. ☐ The above numbered contract/order is modified to reflect the administrative changes (such as changes in paying office, appropriation data, etc.) set forth in Item 13.

C. ☒ This Supplemental Agreement is entered into pursuant to authority of: P.L. 95-91; Title 10, U.S.C. Chapter 641; and the mutual agreement of the parties

D. Other (Specify type of modification and authority) as set forth in Item 13.

12 DESCRIPTION OF AMENDMENT/MODIFICATION

The purposes of this modification are to extend the basic contract to include a post operation period (August 1, 1985 to July 31, 1987) and to establish the terms and conditions for this period. During the post-operation period, Williams Brothers Engineering Company (WBEC) shall provide for the orderly closeout of those contract affairs not associated with the functions and responsibilities that are assumed by the succeeding management and operating contractor.

The provisions of the basic contract are hereby deleted for the post operation period. The post operation period shall be conducted under the terms and conditions attached hereto.

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remain unchanged and in full force and effect.

13
☐ CONTRACTOR/OFFEROR IS NOT REQUIRED TO SIGN THIS DOCUMENT ☒ CONTRACTOR/OFFEROR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN 5 COPIES TO ISSUING OFFICE

14 NAME OF CONTRACTOR/OFFEROR	15 UNITED STATES OF AMERICA
BY Raymond C Harbert (Signature of person authorized to sign)	BY Trudy Wood (Signature of Contracting Officer)
14B NAME AND TITLE OF SIGNER (Type or print) VICE PRESIDENT	14C DATE SIGNED 7/24/85
15B NAME OF CONTRACTING OFFICER (Type or print) Trudy Wood	15C DATE SIGNED 7/31/85

NSN 7540-01-152-8070 — Prescribed by GSA — FAR (48 CFR) 53.243

EXHIBIT "E"
129

• • • •

c. Liquidate WBEC investment plan assets by distribution of funds to individual employees or transfer of employee's balance to the BPOI/Bechtel plan, not later than January 31, 1986. Provide the Contracting Officer, Administrative Contracting Officer and the Director, Office of Industrial Relation, confirmation that this action has been completed.

d. Provide financial & claim information on casualty and group insurance policies as detailed on Exhibit 2, to the Director, Office of Industrial Relations, not later than October 31, 1985.

4. Resolve Outstanding Litigation:

The purpose of this task is to dispose of all existing lawsuits deriving from WBEC's tenure as operation of NPRC in the manner most favorable to the common interests of the DOE and WBEC. Attached is a complete list (Exhibit 3) of the pending litigation and known potential litigation. Unless prior approval of the Administrative Contracting Officer is received, the legal fees associated with pursuit of these cases shall not exceed $5.000 each, except for the two cases at the State Board of Equalization which shall be limited to $25,000 each. WBEC shall:

a. Coordinate information and document requirements for outside counsel;

b. Assist outside counsel to represent and defend WBEC's positions in litigation.

c. Monitor progress of lawsuits and justifications for costs of legal counsel;

d. Confer with and provide documentation to DOE on all pertinent developments regarding outstanding litigation;

e. Obtain DOE approval on litigation matters, particularly all proposed settlements, as required by contract provision 9-50.704-31 Litigation and Claims; and

f. Beginning August 31, 1985, provide a monthly status report on all outstanding cases. This report shall be written in the same format as the reports WBEC is currently providing to DOE. One copy of each report shall be provided to: (1) Contracting Officer, (2) General Counsel for DNPOSR, (3) NPRC Legal Counsel, and (4) Administrative Contracting Officer.

5. Future Litigation:

a. Claims and litigation, shal be processed in accordance with contract Clause 9-50.704-31 Litigation and Claims.

b. WBEC shall not be reimbursed for any costs incurred in the pursuit or defense of a claim or litigation by or against the Government.

Attachment B
Exhibit 3

WILLIAMS BROTHERS ENGINEERING COMPANY
OUTSTANDING NPRC RELATED LAWSUITS
AS OF JULY 31, 1985

Parties	Type of Action	File Date	Amount Sought	Insurance Coverage
ABASSI vs. WBEC	Wrongful Discharge	01/25/85	Not Specified	None
MAXEY vs. WBEC	Wrongful Discharge	10/11/84	$3,000,000 + damages	None
ROGERS vs. WBEC	Wrongful Discharge	4/21/83	Not Specified	None
YAMAS vs. WBEC	Breach of Contract	5/09/84	$3,500,000	None
ARCENAUX vs. WBEC	Personal Injury	3/31/83	Not Specified	Comp. Liab. Ins.
BORUNDA vs. WBEC	Inducement to Breach Contract	3/21/83	$250,000 + damages	Comp. Liab. Ins.

Parties	Type of Action	File Date	Amount Sought	Insurance Coverage
DAVIDSON vs. WBEC	Personal Injury	12/07/82	$20,000 +	Comp. Liab. Ins.
HAWKINS vs. WBEC	Personal Injury	11/30/82	$20,000 + damages	Comp. Liab. Ins.
JOHNSON vs. WBEC	Personal Injury	1/15/85	Not Specified	Comp. Liab. Ins.
KUGE vs. WBEC	Personal Injury	4/15/85	$100,000 + damages	Comp. Liab. Ins.
PACHECO vs. WBEC	Personal Injury	6/20/83	Not Specified	Comp. Liab. Ins.
PARIS vs. WBEC	Personal Injury	3/31/83	$10,000 + damages	Comp. Liab. Ins.
SO. CAL. GAS vs. WBEC	Damages to Real Property	4/12/83	$35,254	Comp. Liab. Ins.
TAYLOR vs. WBEC	Personal Injury	5/5/83	Not Specified	Comp. Liab. Ins.

WBEC vs. GEARHART	Breach of Contract	10/05/84	$98,000	N/A
WBEC vs. CALIFORNIA STATE BOARD OF EQUALIZATION	Sales Tax Refund 11/75-12/77	2/18/83	$4,018,555 + interest	N/A
WBEC vs. CALIFORNIA STATE BOARD OF EQUALIZATION	Sales Tax Refund 1/78-12/81	10/26/83	$10,118,297 + interest	N/A

Note: The above listing does not include personal injury claims against Williams Brothers covered under the Workers Compensation Policy with Western Employees Insurance Co.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed February 15, 1989)

The plaintiff, the United States of America, hereby moves this Court, pursuant to the pretrial scheduling order and to Rule 56 of the Federal Rules of Civil Procedure, for entry of an order granting it summary judgment on the grounds that under California law the manager and operator of the Government's Naval Petroleum Reserve No. 1 (NPR-1), William Brothers Engineering Company (WBEC), was not a construction contractor because it was prohibited by the Government from engaging in construction, did no construction work, and was not responsible for the installation or affixation of the property it purchased or for the performance of the contractors who did the construction installation and affixation and thus its purchases were not subject to California sales taxes because they were sales to WBEC for the purpose of resale to the United States.

This motion is supported by the supporting memorandum of points and authorities, all other pleadings filed herein and by the Declaration of Kenneth Meeks with and the attachments thereto, including the WBEC/Navy contract, No. Nod-10068, and the WBEC/Department of Energy Contract, No. DE-AC01-80RA32049, which are attached to this motion as Exhibit A, and the Declaration of Raymond Harbert, with the attachments thereto, which are attached to this motion as Exhibit B, all of which

demonstrate that there is no genuine issue as to any material fact and that the plaintiff, the United States, is entitled to judgment as a matter of law.

DATED: February 10, 1989.

Respectfully submitted,

DAVID F. LEVI
United States Attorney

YOSHINORI H. T. HIMEL
Assistant United States Attorney

JAMES I. K. KNAPP
JOHN J. MCCARTHY
RICHARD A. CORREA
Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 227
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 724-6555

By: /s/ John J. McCarthy
JOHN J. MCCARTHY

Attorneys for Plaintiff,
United States of America

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF KENNETH MEEKS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed February 15, 1989)

I, *Kenneth Meeks*, hereby declare and state:

1. I am employed by the United States Department of Energy (DOE) as Director, Contracts and Financial Management Division, Naval Petroleum Reserve No. 1 (NPR-1) located at Elk Hills, Kern County, California where I have served in this capacity since May 1980. As Director I am the "Contracting Officer" for DOE's contract to operate the Reserve. Among my responsibilities are: administration of DOE's contract with the operating contractor of NPR-1 and subcontracts executed by the operating contractor for purchases of goods and services; financial oversight of the management and auditing of the expenditure of government funds by the operating contractor; administrative oversight of the management of and accountability for government property by the contractor; and collection of revenues.

2. NPR-1 is one of three Naval Petroleum Reserves. The others are NPR-2 located at Buena Vista Hills, California and HPR-3 located near Casper, Wyoming. The Reserves, including NPR-1, were established by a series of Executive Orders between 1912 and 1924. The Congress approved this method of establishing the Reserves through the enactment of the Pickett Act of 1910,

Pub. L. No. 61-303 (43 U.S.C. § 141), *repealed*, Pub. L. No. 94-579; see, § 701 (43 U.S.C. § 1701 note) Responsibility for the Reserves was initially placed under the jurisdiction of the Secretary of the Navy in 1920 then shifted to Secretary of the Interior in 1921 and thereafter back to the Secretary of the Navy where it remained until October 1, 1977 whereupon, the Secretary of Energy became responsible for the Reserves. (Department of Energy Organization Act of 1977, Pub. L. 95-91, 42 U.S.C. Section 5801.) The Secretary of Energy continues to bear that responsibility.

3. NPR-1 encompasses almost 48,000 acres of land. The United States owns (title to 36,454 acres and mineral rights to and additional 595 acres) approximately 80% of NPR-1 and Chevron U.S.A., Inc. owns (10,360 acres) approximately 20%. Chevron, previously the Standard Oil Company of California succeeded to the property rights of the Southern Pacific Railroad within NPR-1.

4. The participation of the United States and Chevron as owners is governed by a "Unit Plan Contract," (UPC) agreed to by the owners and authorized by the Congress in the Act of June 17, 1944, 10 U.S.C. Section 7426 *et seq.* The UPC establishes the respective rights (without affecting ownership) of both Chevron and the United States and governs the development and operation of NPR-1 as a "Unit" (pages 5 and 6 of the UPC, a true and complete copy of which is attached hereto as "Attachment 1"). Under the UPC, Chevron has approximately a 22% interest in the petroleum production from NRP-1 and the United States has approximately a 78% interest. The actual ownership interests or "percentage participation shares" vary slightly from one "zone," or subsurface hydrocarbon formation, to another (Attachment 1, UPC, pp. 6-8).

5. With the execution of the UPC in 1944, the owners (the United States and Chevron) combined their author-

ity to direct operations at Elk Hills and vested that combined authority in an Operating Commitee ("OC"):

> All exploration, prospecting, development, and producing operations on the Reserve shall be carried on under the supervision and direction of an Operating Committee consisting of two petroleum engineers, one of whom shall be appointed by and shall represent [DOE] and the other shall be appointed by and shall represent [Chevron]. * * * Subject to the other provisions hereof, the Operating Committee shall perform the following functions:
>
> (1) Determine the number of wells to be drilled on the Reserve necessary to secure and to maintain production under this contract, and the location and depth of each well.
>
> (2) Determine the rate at which each well should be produced in accordance with sound oil field engineering practices.
>
> (3) Inspect and supervise all exploration, prospecting, development and producing operations on the Reserve.
>
> (4) Require the use of sound oil field engineering practices designed to achieve the maximum economic recovery of oil from the Reserve.
>
> (5) Act with respect to such other matters as may be referred to the Committee from time to time by both [DOE and Chevron].

(Attachment 1, UPC, pp. 8 and 9, Section 3, para. (b)).

However, these functions are carried under the operational control of DOE:

> [DOE] shall, subject to the provisions hereof, have the exclusive control over the exploration, prospecting, development, and operation of the Reserve, and

> [DOE] may, in its discretion, explore, prospect, develop, and or operate the Reserve directly with its own personnel or it may contract for all or any part of such exploration, prospecting, development and/or operation with competent and responsible parties. Such contracts may be awarded by [DOE] either upon the basis of competitive bids by direct negotiation, in its sole direction, subject to applicable law, but [DOE] shall always use its best efforts to secure as economical an operation as is consistent with sound oil field engineering practices.

(Attachment 1, UPC, p. 8).

6. Although the UPC authorizes DOE to operate the Reserve with its own employees, the government has chosen instead to employ the expertise of a private sector contractor to perform the functions of operating and managing the Reserve subject to the terms of the contracts and the authority of the OC as set forth in the UPC. From 1975 to August 1, 1985, Williams Brothers Engineering Company ("WBEC") was the operating contractor for the Navy and DOE. From August 1985 to the present, Bechtel Petroleum Operations, Inc., ("Bechtel") has been the contractor for DOE. True and complete copies of the two WBEC contracts are attached hereto as "Attachment 2" (Navy Contract No. NOd-10068) and "Attachment 3" (DOE contract No. DE-AC01-80RA32049).

7. While the government retained overall management and policy direction for the development, exploration and operation of NPR-1, implementation of these programs and the day-to-day operation and maintenance of NPR-1 was accomplished through WBEC the operating contractor. (Attachment 2, Navy basic contract, pp. 4-5, sec. III, paras. (b) (c), and pp. 6-7, sec. IV, paras. (a) through (e); Attachment 3,¬DOE Modification A042, Statement of Work and Service, pp. 1 and 2).

8. Except for loss which might have resulted from WBEC's willful misconduct or absence of good faith, the government retained all financial risks under both WBEC contracts. For example, if personal property purchased by the operating contractor was damaged or lost or if a subcontractor failed to perform, the costs attendant to such losses or failure were born by the government (Attachment 2, Navy Modification P00006, pp. 3-5, para. (g); Attachment 3, DOE basic contract, Part II, sec. J, p. 16 para. J.12). Costs incurred by the operating contractor were paid with government funds and the terms of the contract. (Attachment 2, Navy basic contract, pp. 10-13, sec. V; Attachment 3, DOE basic contract, Part II, Sec. J, p. 16., para. J.12 and Additional General Provisions, p. 5, para. 7(b))

9. The operating contractor at NPR-1 has no ownership or possessory interest in government real or personal property. Title to any personal property the contractor may purchase with government funds passes from the vendor to the United States. (Attachment 2, Navy basic contract, p. 16, sec. VIII, paras. (b) and (c); Attachment 3, DOE basic contract, Additional General Provisions, p. 5, para. 7(b)).

10. From 1975-1980 WBEC disbursed its own funds for the operation of NPR-1 and was reimbursed by the United States. From 1980-1985 WBEC utilized a letter of credit account maintained by DOE with government funds. With the letter of credit account WBEC would write checks on the account to pay the costs of operations at NPR-1. The bank where the account was maintained each day would accumulate checks presented for payment and at the end of the day request a wire transfer from the U.S. Treasury for the total amount to be disbursed that day. Upon receiving the wire transfer of funds the DOE account would be credited and the checks presented for payment would be paid (Attachment 3, DOE basic contract, Part II, sec. J, p. 16, para. J.12). The procedures for maintaining and operating such a line of credit acount are contained in the U.S. Treasury Fiscal Requirements Manual, Part VI, Section 1020 (Attachment 4).

11. Under the contracts with the government, WBEC provided management services. Labor for all work covered by the Davis Bacon Act of 1931, 40 U.S.C. section 276a *et seq.*, (*e.g.* public works including drilling and construction of production facilities) which was performed at NPR-1 was to be supplied by subcontractors and not by the operating contractor. (Attachment 3, DOE basic contract, Part II, sec. J, p. 18, para. J.15). Among the contractual duties of WBEC at NPR-1 were the procurement and the monitoring of drilling and construction services of subcontractors. (Attachment 3, DOE Modification A042, Statement of Work and Services, p.3 Summary at Work and Services, para. b). However, WBEC was not financially responsible for the performance of the subcontractors or for the completion of the work required by those subcontracts. (Attachment 3, DOE Modification A042, Statement of Work and Services, p. 5, para. g).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of February 1989.

/s/ Kenneth W. Meeks
KENNETH MEEKS

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF RAYMOND HARBERT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed February 15, 1989)

I, Raymond Harbert, declare and state:

1. From September 1975 to October 1987 I was employed by Williams Brothers Engineering Company ("WBEC"). From 1975 to 1985 WBEC was the government's operating contractor at the Naval Petroleum Reserve No. 1 ("NPR-1") located at Elk Hills, Kern County, California. From September 1975 to March 1982 I served at NPR-1 as WBEC's Assistant General Manager and Manager for Finance and Administration as such I was responsible for financial management, procurement, inventory control, personnel, management systems, office services (including recordkeeping) and administration of WBEC's contract to operate NPR-1. From April 1982 to October 1987 I served at WBEC's headquarters in Tulsa, Oklahoma as vice president and senior manager for WBEC's contract with DOE for operating of NPR-1. Although WBEC's contract with DOE ended in 1985, I continued to supervise the "close-out activities until my retirement in October 1987. I am presently self-employed as a management and engineering consultant.

2. NPR-1 is jointly owned by the United States and Chevron, U.S.A., Inc. It is operated through the cooperation of both owners according to the terms of the Unit Plan Contract ("UPC"), a congressionally sanctioned agreement between the parties. (A true and correct copy of the UPC is attached hereto as, Attachment 1.) Under the terms of the UPC the government is given control of exploration, prospecting, development and operation of NPR-1 and the discretion to operate with its own employees or to hire a contractor for that purpose (Attachment 1, p. 8, sec. 3, para. (a)). WBEC was hired to operate NPR-1 by the U.S. Navy from 1975 to 1977 and was subsequently retained by the U.S. Department of Energy ("DOE") from 1977 to 1985 when DOE took over responsibility for all the Petroleum Reserves.

3. As operating contractor for the government, WBEC was obligated by contract to apply its oil field expertise in the management and administration of NPR-1. (see, Attachment 2, p. 21, sec. X and Attachment 3, p. 1 *et seq.* Attachments 2, 3, 4, 6, 7-9, 12-13, and 23 hereto are excerpts from WBEC's contracts with the Navy and DOE for the operation of NPR-1. Because these contracts are voluminous they have not been attached hereto but, for true and complete copies of the contracts refer to the Meeks Declaration, filed herein, Attachments 2 and 3 thereto.) Typically, WBEC received technical direction from either the government (the Navy until 1977, DOE thereafter) or from the Operating Committee (OC), established under the UPC. The OC is composed of a representative of each of the two owners (the United States and Chevron, U.S.A., Inc.). Although DOE has control over exploration, prospecting, development and operation of NPR-1, these activities, according to the provisions of the UPC, are to be "* * * carried on under the supervision and direction of an Operating Committee * * *" (Attachment 1, p. 8, Sec. 3, para. (b)).

4. From 1975 to 1985 WBEC procured, except for some direct purchases made by the Government, all goods and services for operations at NPR-1 pursuant to its con-

tractual obligations to the government. Accordingly, as required by its contract with DOE (pertinent provisions of the DOE contract are at Attachment 4, para. J.23) and to ensure uniformity and compliance with government procurement policies and procedures WBEC published a manual, for use by WBEC's employees carrying on the procurement process. (Because the WBEC Purchasing and Subcontract Manual is voluminous, only pertinent portions are excerpted and filed herewith as Attachment 5). All of the procurement policies and procedures contained in the WBEC manual were approved by DOE and the OC.

5. Goods procured by WBEC for the government were either stored in inventory or installed immediately either by the government or by subcontractors. WBEC did not install or use the goods it purchased. Many of WBEC's procurements included machinery and equipment such as pumps, compressors, pipe, generators, tanks, and valves, all of which could be easily disassembled and moved from one site to another depending on where petroleum was being produced. WBEC procured other machinery and equipment including trucks, forklifts, and earth movers. Title to all goods purchased by WBEC for the government passed from the vendors directly to the United States pursuant to standard government procurement policy and property clauses contained in WBEC's contracts (pertinent contract provisions are at Attachment 6, Navy contract paras. (b)(c), DOE contract para. 7(b)); see also, 46 C.F.R. § 50-704.21).

6. In addition to procuring goods at NPR-1, WBEC also procured the services of other contractors, referred to as subcontractors. These independent subcontractors were the construction contractors which prepared sites for drilling oil wells, drilled wells, and constructed collection systems (systems of pipelines, valves, pumping stations and tank collection points used to move petroleum and its by-products from the well to natural gas separa-

tion plants and to storage tanks) natural gas plants, storage tanks for petroleum and natural gas, roads, fences and other support facilities. WBEC was always prohibited by the government from carrying on any construction activities, covered by the Davis Bacon Act of 1931, 46 Stat. 1494, as amended, (40 U.S.C. Section 276a *et seq.*), (construction and alteration or repair of public buildings or public works). Although, generally the Navy contract permitted WBEC to perform construction activities (Attachment 3, Navy contract para. (d)), in fact, WBEC was prohibited by the Navy from doing so and WBEC never performed as a construction contractor for the Navy. Similarly, DOE prohibited WBEC from engaging in construction activities and included the prohibition in the DOE contract (Attachment 7, para. J.15). Furthermore, it would have been impractical for WBEC to engage in construction activities because its employees were paid wages which had been negotiated with the Navy and later with DOE, while the Davis-Bacon Act would have required WBEC to pay construction workers wages which would have been determined by the U.S. Department of Labor. Thus, WBEC would have been required to maintain two wage structures and two sets of payroll records. Moreover, WBEC was not insured for the liability risks of a construction contractor, such as, for the loss of or damage to construction materials and equipment, for the costs attendant to the failure of subcontractors to perform including the cost of labor and materials for work in progress but not completed, or for post completion liability (pertinent contract provisions are at Attachment 8, Navy contract secs. XI and LV; Attachment 9, DOE contract para. 14; see also, 48 C.F.R. § 50.704-32). In addition, WBEC was not licensed by California to engage in construction or general contracting. However, all construction subcontractors at NFR-1 were required by their subcontracts to be licensed.

7. The relationship of WBEC to a drilling or construction subcontractor was always one of monitoring and inspection of ongoing work for quality assurance or to ensure compliance with the plans approved by the OC for a given project (see, pertinent contract provisions at Attachment 3, DOE contract p. 3, para. g; see also, OC minutes at Attachment 10, p. 2; and, drilling subcontract provisions at Attachment 11, p. 1, Article 1 and p. 2, Article 3). An example of WBEC monitoring for quality assurance was its inspection of drilling to ascertain whether it was being performed according to the engineering specifications contained in the drilling program, established by DOE's and Chevron's technical personnel and approved by the OC. Such specifications were incorporated into drilling subcontracts. For some subcontracts others performed the monitoring and inspection function such as the architect for construction of the administration building and the Navy for construction of the two natural gas separation plants.

8. WBEC was not financially responsible for the performance of subcontractors or for completion of work specified in the subcontract (pertinent subcontract provisions are at Attachment 11, p. 1, Article 1 and p. 2, Article 3; and, pertinent contract provisions are at Attachment 12, Navy contract sec. LV, DOE contract para. (b)). If, for instance, a subcontractor did not complete road construction in accordance with subcontract specifications and a second subcontractor was hired to complete the work, DOE, not WBEC, bore the risk of increased costs of labor and materials, lost time and opportunity due to inability to use the roads under construction, the cost of settling a claim by the defaulting subcontractor for partial payment and the cost of a lawsuit against the defaulted subcontractor for damages (see, pertinent DOE contract provisions allowing reimbursement of costs of litigation at Attachment 13, para. 13; a request for DOE's approval of a claim settlement as a reimbursable cost at

Attachment 14, and DOE's authorization to file a lawsuit, and thus, incur associated costs at Attachment 15; see also, para. 6 *supra*).

9. Moreover, WBEC could not direct the performance of the subcontractor or its employees; the subcontractor was operationally independent from WBEC (pertinent DOE contract provisions of a typical subcontract are at Attachment 11, p. 1., Article 1 and p. 2, Article 3). In the event a subcontractor did not meet its obligations under the subcontract or did not perform in compliance with project plans, WBEC had to obtain approval to take corrective action. If the failure of the subcontractor impacted project cost, approval of the OC would be necessary. If the failure affected only performance, approval of DOE would be necessary. With the approval of the OC or DOE, WBEC could terminate a subcontract, withhold pay from a subcontractor, and, in the event of default, award a substitute subcontract (a request for the OC's authorization to terminate a subcontract is at Attachment 16 and DOE's authorization to terminate two subcontracts and to pay costs is at Attachment 17).

10. All subcontracts entered into by WBEC were subject to the standard procedures contained in the WBEC Purchasing and Subcontract Manual for NPR-1 which had been approved by DOE and the OC. The broad general policies for every kind of procurement requiring the expenditure of government funds were contained in the section of the manual titled "Procurement Policy Statement" (Attachment 5, Section 810-001). Other portions of the manual provided explicit step by step procedures for the issuance of a Request for Proposal (RFP) and for the receipt and evaluation of bids, and for the award of a contract. (Attachment 5, Section 840-001, p. 8, paras. 13 and 14).

11. The procedures manual provided that RFP's were to be reviewed and approved by DOE before any solicitation was made. (Attachment 5, Section 810-001, p. 8)

DOE typically approved standard requirements and clauses, "boiler plate" of the RFP. After approval of the RFP by the OC, (pertinent documents are at Attachment 18) WBEC sent solicitation packages to contractors which had been preapproved by DOE and considered by the OC to be qualified to submit bids (a solicitation for applications to be placed on the approved list of bidders is at Attachment 19).

12. After bids were received by WBEC, they were required to be opened and reviewed in the presence of the OC (Attachment 5, Section 840-001, p. 10). WBEC evaluated the proposals, and made a recommendation to DOE and the OC for selection of a successful bidder. Selection was made by DOE and the OC (a recommendation is at Attachment 20). After selection, WBEC prepared the final subcontract and submitted it to the OC for final approval (a request for approval to award a subcontract is at Attachment 21). Thereafter, WBEC executed the subcontract.

13. This procurement process resulted in a subcontract between the successful bidder and WBEC in accordance with directions from the OC or DOE as party to the contract. Changes or modifications to outstanding subcontracts also required approval of the OC (a request for a change order is at Attachment 22).

14. From 1975-1980 WBEC was reimbursed by the United States for the costs of operating NPR-1. From 1980-1985, WBEC paid the costs of operating NPR-1 with DOE funds. In the latter case DOE maintained a line-of-credit checking account at a local bank upon which WBEC would write checks. Each day as checks were presented for payment against the account, the bank accumulated the checks and submitted a letter of credit drawdown electronically to the U.S. Treasury for the total disbursements for that day. The Treasury would then wire funds in the amount of the total daily disbursements and DOE's account would be credited (pertinent

disbursements and DOE's account would be credited (pertinent contract provisions are at Attachment 23).

15. On July 5, 1978, California issued a Notice of Determination to WBEC asserting a deficiency of $2,932,716.54, plus interest, in the payment of sales and use taxes for the years 1975-1977. On August 2, 1978, WBEC sought an administrative redetermination which resulted in an adverse decision on June 7, 1979. WBEC appealed this decision to the State Board of Equalization. On April 13, 1982 the Board affirmed the adverse redetermination (the decision is at Attachment 24) except for a reduction in the tax of $382,381.68. The residue consisted of tax of $2,550,334.86, with interest of $1,468,221.38, a total of $4,018,555.89. The Board's decision also provided that if the tax plus interest was not paid by May 1, 1982, interest of $25,503.54 would begin to accrue at a rate of 1% per month or fraction thereof, and if not paid by May 13, 1982 an additional penalty of $255,033.49 would be assessed. Thus, in an effort to avoid the additional interest and penalty, WBEC submitted a check to the Board on April 29, 1982. An action challenging the assessment was filed in Superior Court, Los Angeles County, by WBEC on February 18, 1983.

On December 13, 1982, a second Notice of Determination was issued by California to WBEC asserting a tax deficiency of $7,483,062.36, plus interest of $2,635,235.18, covering the period 1978-1981. Payment was made on December 23, 1982. WBEC appealed directly to the State Board of Equalization for a redetermination which resulted in an adverse decision. Thereafter, a second action seeking a refund was filed in Superior Court, Los Angeles County on October 26, 1983. During the pendency of both lawsuits WBEC and the State stipulated to partial judgments of $1,827,791.37 for the period 1975-1977, and $1,355,306.39 for the period for 1978-1981. The partial judgments were refunds for items purchased by WBEC and installed by Navy personnel rather than by subcon-

'ractors. Subsequently, both lawsuits were dismissed without prejudice; the earlier action was dismissed on January 25, 1988 and the later one on January 20, 1988.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on this 9th day of February, 1989.

/s/ Raymond Harbert
RAYMOND HARBERT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed February 27, 1989)

The plaintiff, the United States of America, hereby opposes the motion for summary judgment of the defendants, the State of California and the California State Board of Equalization, on the grounds that (1) Williams Brothers Engineering Company (WBEC) was not subject to the sales taxes at issue here because the undisputed evidence in this case (the contracts between WBEC and the Government and the declarations of Government and company officials) demonstrates that WBEC was prohibited from engaging in construction and did not do so. WBEC was not responsible for the installation or affixation of the property it purchased, and was not responsible for the performance of the contractors who did the installation or affixation, and thus, WBEC's purchases were not purchases made in the performance of a construction contract and therefore, the sale for resale exclusion to the sales tax applies; (2) the two state court actions upon which the State bases its claim that the United States is precluded by the doctrines of res judicata and collateral estoppel from proceeding with the present action were dismissed without prejudice and were not final determinations on the merits; and (3) the United States is not barred by the appropriate statute of limitations from recovering the taxes paid by WBEC because this right of action for recovery of the payments arose when WBEC's claim for refund was denied by the State which

was well within the six-year period of limitations of 28 U.S.C., Sec. 2415(a).*

This opposition is supported by the attached memorandum of points and authorities, the Declaration of Raymond Harbert which is attached hereto as Exhibit A, the plaintiff's motion for summary judgment and accompanying exhibits and its supporting memorandum, and all other pleadings filed herein, all of which demonstrate that the motion for summary judgment of the defendants is wholly without merit and must be denied.

DATED: February 25, 1989.

Respectfully submitted,

DAVID F. LEVI
United States Attorney

YOSHINORI H. T. HIMEL
Assistant United States Attorney

JAMES I. K. KNAPP
JOHN J. MCCARTHY
RICHARD A. CORREA
Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 227
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 724-6555

By: /s/ John J. McCarthy
JOHN J. MCCARTHY

Attorneys for Plaintiff,
United States of America

* The defendants have also argued that there is no constitutional prohibition to the imposition of the tax on WBEC, but that issue was not raised in the plaintiff's complaint or motion for summary judgment and is not an issue in this case. Consequently, it will not be addressed in this opposition or in the supporting memorandum of law.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF RAYMOND HARBERT IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed February 27, 1989)

I, Raymond Harbert, declare and state:

1. I am the declarant of the Harbert Declaration filed herein, as Exhibit B to plaintiff's motion for summary judgment and, as stated therein, I was employed by Williams Brothers Engineering Company (WBEC) at NPR-1, during the period relevant to the captioned action, as Assistant General Manager and Manager for Finance and Administration, and, thereafter at WBEC's headquarters in Tulsa, Oklahoma, as vice president and senior manager of WBEC's contract to operate NPR-1.

2. WBEC was obligated by its contract with the government to procure the goods and services necessary for the operation of NPR-1. In pursuit of this obligation WBEC executed subcontracts for the provision of construction services and other services in accordance with procedures approved by the government. The government was not a party to these subcontracts. In an attempt to clarify the fact that there was no contractual relationship between subcontractors and the government, the Navy, on July 8, 1977, (see, defendant's motion for summary judgment, Hennessy Declaration, Exhibit D, p.3, para. 2(a)) directed that a change be made to certain language con-

tained in requests for proposal subcontracts, and purchase orders. This change required that the words "prime contractor" be substituted for the word "agent" to more accurately describe the separation between WBEC and the government, and thus, not implicate the Navy as a party to subcontracts and purchases orders. The change was not an attempt to describe WBEC's relationship with subcontractors. In fact, no changes occurred in procurement procedures or practices or in WBEC's contractual obligations to the government as a result of the language change.

3. As operating contractor at NPR-1, WBEC was directed to concentrate effort on the management of the oil field. In pursuit of its management function WBEC inspected the work of independent drilling and construction subcontractors. To avoid a potential conflict of interest on the part of WBEC the government did not permit WBEC to engage in the same activities that it was contractually obligated to inspect for quality assurance. Thus, as a matter of policy, WBEC was prohibited by both the Navy and DOE from engaging in drilling or construction activities (see, plaintiff's motion for summary judgment, Harbert Declaration, para. 6). As in more fully described in paragraph 7 of the Harbert Declaration previously filed herein as Exhibit B to plaintiff's motion for summary judgment, WBEC was neither a general contractor with respect to the construction subcontractors nor responsible for the installation of affixation of goods purchased by WBEC but installed by the subcontractors.

I declare under penalty that the foregoing is true and correct.

Executed on this 22 day of February, 1989.

/s/ Raymond Harbert
RAYMOND HARBERT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed February 28, 1989)

In its Complaint for Declaratory Relief and For a Refund of Taxes, plaintiff United States seeks a declaratory judgment that William Brothers Engineering Company ("WBEC") was not a construction contractor under California law. (See ¶ 2 of Complaint.) The United States requests in the Complaint that this Court declare that under the terms and conditions of the contracts between WBEC and the government, WBEC was not responsible for the installation of property it purchased and thus was not a construction contractor under Regulation 1521.

In its Motion for Summary Judgment, the United States alleges that WBEC was not a construction contractor because the Navy and DOE prohibited WBEC from engaging in construction. There are a couple of problems with the United States' approach. First, it seeks a declaratory judgment on the meaning of the contract. The interpretation of the contract is the exclusive province of this Court and is a matter for summary judgment. The facts as submitted by the United States by means of the Harbert declaration does not establish their proposition as a matter of law. The facts relied upon by the United States cannot be gleaned from the contract or its modifications and merely indicates that

there is a triable issue of fact in how the contract was actually performed by WBEC. Thus, to the extent that the United States is correct there must be a trial on the issue of whether WBEC was prohibited from engaging in construction. The second problem of the United States is that it never alleged in its Complaint that WBEC was prohibited by the Navy and DOE from performing construction work.

In order to resolve the issue as a matter of law there must be no triable issues of act and that everything must be able to be resolved by interpretation of the contract before the Court. Thus, in determining whether WBEC is a construction contractor under its contract with the government, the only legitimate evidence is the contract and its various modifications.

ARGUMENT

I

THE CONTRACT BETWEEN THE UNITED STATES AND WBEC SPECIFICALLY PROVIDES FOR CONSTRUCTION WORK TO BE UNDERTAKEN BY WBEC

In reviewing the actual contract between WBEC and the government, it is clear that the real purpose of the contract was for WBEC to accomplish construction activity. Section IV of the original contract provides as follows in pertinent part:

> "(a) The *OPERATOR* [WBEC] shall perform, upon the terms and conditions hereafter set forth, the work of exploring, prospecting, developing, and operating the lands. . . .
>
> "
>
> "(d) *OPERATOR* shall perform on *NAVY*'s behalf directly or by subcontract [subject to Section XVII hereof], such operations, including the acquisition of materials and the construction of new facilities as may be necessary for the *NAVY* to receive and disperse its share of . . .

> "(e) The exploration, prospecting, development and operation of the unit . . . shall include, without being limited thereto, the following functions:
>
> "(1) The drilling and equipping of wells, including water and gas injection wells which are drilled at the direction of the *NAVY*.
>
> "(2) The deepening, redrilling, repairing, and cleaning out of wells.
>
> "(3) Exploration and prospecting.
>
> "(4) The shutting-in and/or abandonment of wells.
>
> "(5) The production of oil, gas, natural gasoline and associated hydrocarbons from the unit and non-unit lands under all conditions. . . ."
>
> "
>
> "(7) The furnishing . . . plus construction and maintenance of structures and facilities required for the work hereunder. . . ."
>
> "(9) The maintenance of all *UNIT* and Navy owned surface and subsurface facilities and equipment including roads.

See Meeks Declaration, Attachment 2, pages 6, 7, and 8.

In addition, DOE Contract No. EL-76-C-01-7001 Modification No. 32 provides as follows:

> "5. *New Development*. The drilling and completion of wells in the development program shall be subcontracted and supervised." There follows a listing of wells, total 94 in all. See Meeks Declaration, Attachment 2.

Furthermore, in DE AC01-80RA32049 Mod. A042, dated November 29, 1984, lists the following duties of WBEC:

"1. Drilling Operations.

"a. *Drilling Operations Management*—Responsible for management and operational aspects of site preparation, drilling, and completion of all new and redrilled oil wells, gas wells, injection wells, disposal wells, water source wells, and all major remedial work. . . .

"b. *Development Drilling*—Responsible for all operational aspects of drilling and completion of all new and redrilled oil wells, gas wells, water source wells, injection, and disposal wells.

"c. *Exploratory Drilling*—Responsible for all operational aspects of drilling and completion of exploratory wells.

"d. *Remedial Well Work*—Responsible for all major well remedial and stimulation work as required in order to maintain existing wells in optimum condition."

See Meeks Declaration, Attachment 3.

All of these provisions meet the definition of Construction Contract in Regulation 1521(A)(1)(a).

What is the evidence contained in the contract relied upon by the government that WBEC was prohibited from doing construction activity? Paragraph 6 of the Harbert Declaration states without any citations to any documents submitted to this Court that the Navy prohibited WBEC from performing construction activity. If true, this merely indicates a triable issue of fact. Further, paragraph 6 of the Harbert Declaration states that DOE included the prohibition in the contract. The only citation is Attachment 7 to the Harbert Declaration, Paragraph J.15. Atachment 7, paragraph J.15 states as follows:

"All Davis-BAct Covered Work (ACT of March 31, 1931 as amended (40 U.S.C. 2769-7)), should be performed by subcontract. (See provision 'Special Clause for Operating Contracts.'"

This is not a sufficient showing for the granting of Plaintiff's Motion for Summary Judgment that WBEC is not a construction contractor under Regulation 1521.

II

THE UNITED STATES HAS NOT SHOWN THAT UNDER THE CONTRACT WBEC WAS NOT RESPONSIBLE FOR THE AFFIXATION OR INSTALLATION OF PROPERTY

Although the United States attempts to combine the concept of no construction activity by WBEC and responsibility for final affixation, they are in fact separate arguments. The argument that WBEC was not a contractor goes to whether the WBEC contract with the government was a Construction Contract. In raising the specter of no financial responsibility, the government is attempting to take advantage of an exclusion in Regulation 1521. It is important to realize that in order to take advantage of this exclusion, the United States admits that the WBEC contract is a construction contract. Were it not a Construction Contract in the first instance, the exclusion in Regulation 1521 could not apply.

The United States also relies upon the Harbert Declaration for the proposition that WBEC was not financially responsible for the completion of work of the subcontractors. See Harbert Declaration, Par. 8. Yet, the evidence for the proposition cited by Harbert does not show that the contract itself provides that WBEC is not financially responsible.

First, it must be pointed out to the Court that WBEC executed a performance bond in the original amount of $5,000,000. See Schedule B to the original contract, Meeks Declaration, Attachment 2. This, by itself, indicates that WBEC has some financial responsibility for the performance of the contract. Second, Attachment 11 to the Harbert Declaration relied upon by the govern-

ment concerns Rotary Drililng Subcontractors, and states in Article 3:

> ". . . The work contemplated herein shall meet the approval of contractor and be subject to the general right of inspection herein provided, for contractor to secure the *satisfactory completion thereof.*" (Emphasis added.)

The fact is that independent contractors are used in Rotary Drilling Subcontracts dosen't mean the prime contractor, WBEC, is not responsible for the work performed. In fact, this contract provides the opposite. Third, the government relies upon Attachmcnt 12 to the Harbert Declaration, Section IV. This section provides:

> "(a) Except to the extent that the operator is *responsible under this contract for the deficiencies in the services required to be performed* . . . the operator shall not be liable by reason of operator's performance of services or delivery of materials under this contract, for loss of or damage to property of the Government occurring after government acceptance of the services." (Emphasis added.)

This provision indicates WBEC is in fact responsible under the contract for deficiencies in services to be performed. What it is *not* responsible for under this is only damage to property of the government after the government accepts the services. These provisions do not establish that WBEC was not financially responsible for the performance of subcontractors.

As pointed out in Defendants' Memorandum of Points and Authorities on page 17, Regulation 1521 excludes sonal property under what is otherwise a construction contract *if the person furnishing the property is not responsible* under the contract *for the final affixation or installation* of the property furnished." However, to fall under this exclusion, the construction contract itself must specify that WBEC is no tresponsible for the final affrom coverage for ". . . the furnishing of tangible perfixation or installation. There is no provision of the contract which plaintiff can point to that accomplishes this result.

The contract itself, as pointed out above provides that WBEC is in fact responsible. Section IV(d) provides that the *operator* will construct new facilities. Section IV (e)(7) provides that the *operator* will construct and maintain facilities. Section IV(e)(9) provides that the *operator* maintain roads, pipelines, powerlines, communication systems and building. Section XII(b) of the original contract provides that ". . . *OPERATOR* covenants to undertake primary responsibility for all services hereby contracted for. . . ." The contract does not provide that WBEC has no responsibility for affixation or installation of the property purchased.

In addition to all of this, on July 8, 1977, the WBEC subcontracts were amended to refer to WBEC as the prime contractor. See Declaration of Robert Milam, Exhibit D. All amendments entered into after this date identified WBEC as the prime contractor. A prime contractor, or general contractor, in the workaday world of construction is responsible for affixation or installation of property, even if done by a subcontractor.

III

THE DECLARATION OF HARBERT ESTABLISHES THAT THE UNITED STATES DID NOT SUE WITHIN THE PERIOD OF THE STATUTE OF LIMITATIONS

As pointed out in the Defendants' Motion for Summary Judgment, title 28 United States Code, section 2415 requires a quasi-contract lawsuit to be brought within six years of payment. The declaartion of Raymond Harbert establishes that WBEC paid to the Board of Equalization its payment of $4,018,555.89 on April 29, 1982. See par. 15 of Harbert Declaration. This suit was filed on May 12, 1988, more than six years after April 29, 1982. Thus, the United States has judicially admitted that as to the payment made on April 29, 1982, the cause

of action was not properly filed within the period of the statute of limitations.

IV

THE REAL ISSUE WHETHER OR NOT PROPERTY INSTALLED AND AFFIXED BY SUBCONTRACTORS UNDER THE DIRECTION AND CONTROL OF WBEC IS TAXABLE IS NOT ADDRESSED BY THE UNITED STATES

The United States in engaging in its very technical argument ignores the real issue in this case: is the property installed and affixed by subcontractors under the direction and control of WBEC taxable under California law? The answer its yes.

The declaration of Donald Hennessy establishes that prior to October 1, 1976, the vendors selling property to WBEC paid the appropriate sales tax to the defendant. WBEC reimbursed its vendors for the tax paid. Then, upon instructions from the United States, WBEC began issuing exemption certificates to the vendors so the vendors do not have to pay the tax. The rationale behind this was that the incidence of the tax was on the United States and therefore no tax was due.

However, in 1982 the United States Supreme Court in *United States* v. *New Mexico* 455 U.S. 720 (1982), settled whether the incidence of a tax was on the United States. To have the incidence on the United States, the entity must be an instrumentality of the United States. The *United States* v. *New Mexico* case removed any rationale for WBEC issuing exemption certificates to its third party suppliers. Yet, WBEC continued issuing the exemption certificates.

In the WBEC state court cases, WBEC showed that some of the material purchased by WBEC was, in fact, installed by the Navy. When presented with this information the Board made refund to WBEC for taxes paid on the Navy-installed material. Under Regulation 1521 this was non-taxable property.

In making its argument the United States is attempting to insulate WBSC from any responsibility for taxes on property either it installed or was installed by its subcontractors. This would effectively exempt this property contrary to the standards established in *United States* v. *New Mexico*. This is especially egregious when WBEC itself issued exemption certificates to its third party suppliers which exempted the vendors from paying the tax. There is no doubt that with such actions WBEC became the consumer of the materials purchased and thus became liable as a United States Construction Contractor under Regulation 1521.

CONCLUSION

In seeking declaratory relief in the meaning of the contract, the United States must rely upon only the terms of the contract itself. To the extent that the United States raises for the first time in its Motion for Summary Judgment that the contract wasn't performed as written, the United States merely raises a triable issue of fact.

The contract itself provides that WBEC is a Construction Contractor under Regulation 1521. The contract gives WBEC responsibility for construction of facilities and roads and exploration and developing various types of wells. The United States cannot be granted summary judgment on its motion because it hasn't shown the contract itself supports its position. In fact, it is clear that the contract itself supports Defendants' Motion for Summary Judgment that WBEC is a Construction Contractor as a matter of law.

The United States in arguing that WBEC was not financially responsible, admits that the WBEC contract is a construction contract but that an exclusion applies. The United States has not shown that the contract provides that WEBC was no responsible for the final affixation or

installation of the property. In fact, the contract provides the opposite and thus this Court should grant the Defendants' Motion for Summary Judgment that WBEC is a Construction Contractor as a matter of law.

In its Motion and supporting declaration the United States judicially admits that this suit was not brought within the proper statute of limitation as to one of the payments sought to be recovered. Thus, as a matter of law, that payment may not be recovered in this action.

DATED: February 24, 1989

Respectfully submitted,

JOHN K. VAN DE CAMP
Attorney General of the
State of California
ROBERT F. TYLER
Supervising Deputy
Attorney General

By: /s/ Robert D. Milam
ROBERT D. MILAM
Deputy Attorney General
Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF RAYMOND HARBERT IN SUPPORT OF PLAINTIFF'S MEMORANDUM IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed March 6, 1989)

The plaintiff, the United States of America, pursuant to the provisions of Rule 56, Fed. R. Civ. P. hereby submits the attached Declaration of Raymond Harbert in support of its memorandum in reply to defendant's opposition to plaintiff's motion for summary judgment. The declaration is also submitted in further support of plaintiff's motion for summary judgment.

DATED: March 3, 1989.

Respectfully submitted,

DAVID F. LEVI
United States Attorney

YOSHINORI H. T. HIMEL
Assistant United States Attorney

JAMES I. K. KNAPP
JOHN J. MCCARTHY
RICHARD A. CORREA
Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 227
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 724-6555

By: /s/ John J. McCarthy
JOHN J. MCCARTHY

Attorneys for Plaintiff,
United States of America

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF RAYMOND HARBERT

(Filed March 6, 1989)

I, Raymond Harbert, declare and state:

1. I am the declarant of the Harbert Declarations filed herein, as Exhibits B (referred to here as Harbert Decl. I) to plaintiff's motion for summary judgement and as Exhibit A (referred to here as Harbert Decl. II) to plaintiff's opposition to defendant's moton for summary judgement, and as stated therein, I was employed by Williams Brothers Engineering Company (WBEC) at NPR-1, during the period relevant to the captioned action, as Assistant General Manager and Manager for Finance and Administration, and, thereafter at WBEC's headquarters in Tulsa, Oklahoma, as vice president and senior manager of WBEC's contract to operate NPR-1.

2. In Harbert Decl. I at paragraph 6 and in Harbert Decl. II at paragraph 3, I stated that WBEC was prohibited by both the Navy and DOE from engaging in Davis-Bacon Act covered activities which includes construction (*e. g.*, construction and alteration or repair of public buildings or public works).

Paragraph IV(c) of the WBEC/Navy contract authorizes the Navy at its election to perform any function assigned to WBEC under the contract, including construction, either with its own personnel or by separate contract. This is the contract provision which authorized the Navy

to prohibit WBEC from engaging in construction or other Davis-Bacon Act activities. Section IV, paragraph (c), of the WBEC/Navy contract is attached to Harbert Decl. I as Attachment 3. DOE's prohibition against construction by WBEC, is incorporated into the WBEC/DOE contract and for convenience is attached to Harbert Decl. I as Attachment 7, paragraph J.15.

3. When WBEC was hired by the Navy in 1975 the Navy required WBEC to obtain a performance bond (a copy of which is attached hereto as Attachment 1) in the amount of $5,000,000. The bond covered the performance of WBEC's activities and obligations under the WBEC/Naxy contract to operate NPR-1. The surety under the bond might have been required to make payments to the Navy if, for example, WBEC failed to hire competent personnel, failed to pay suppliers invoices or employee payrolls, or embezzled funds. After WBEC had performed satisfactorily as operating contractor for a year, the Navy directed WBEC to cancel the bond and remit to the Navy all refunded premiums (letter directing cancellation is attached hereto as Attachment 2). The bond was not a construction bond and did not cover the performance or failure to perform of subcontractors. Indeed, after cancellation of the bond no changes occurred in procurement procedures or practices or in WBEC's contractual obligations to the Navy. No subsequent bond was required either by the Navy or DOE.

4. In Harbert Decl. I, paragraph 8, I stated that WBEC was not financially responsible for a subcontractor's performance or failure to perform. Both the WBEC/Navy and WBEC/DOE contracts to operate NPR-1 were cost reimbursement contracts whereby, all costs of operation including all costs related to subcontractors' performance or failure to perform were reimbursed by the government. In the event a subcontractor failed to perform in accordance with the terms of its subcontract, any incidental costs associated with that failure, such as demolition and reconstruction costs, settlement costs, or litiga-

tion costs were reimbursed by the government under the contracts (see, Harbert Decl. I, paragraph 8 and attachments 13-15, thereto). If incomplete work required the hiring of a second subcontractor, similarly, the cost of the second procurement of services and the second subcontractor's costs would be reimbursed to WBEC under the operating contracts. WBEC was financially responsible only for the willful misconduct or bad faith of its officers (see, Harbert Decl. I, paragraph 8 and Attachment 12 thereto).

I declare under penalty that the foregoing is true and correct.

Executed on this 2 day of March, 1989.

/s/ Raymond Harbert
RAYMOND HARBERT

ATTACHMENT "1"

CONTRACT NO. NOd-10068

SCHEDULE B—PERFORMANCE BOND

No. 80322992

KNOW ALL MEN BY THESE PRESENTS, That we, THE RESOURCE SCIENCES CORPORATION and WILLIAMS BROTHERS ENGINEERING COMPANY, and each of them, Jointly and Severally of 6600 South Yale Avenue, of Tulsa, in the State of Oklahoma 74136, as Principal, and FEDERAL INSURANCE COMPANY, 51 John F. Kennedy Parkway, of Short Hills in the State of New Jersey 07078, as Surety, are held and firmly bound unto the United States of America in the penal sum of five million dollars ($5,000,000) lawful money of the United States for the payment of which sum well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas Principal entered into a certain Contract No. NOd-10068, with the United States of America, acting by and through the Secretary of the Navy, for the operation of Naval Petroleum Reserves in California.

NOW, THEREFORE, If Principal shall well and truly perform and fulfill all undertakings, covenants, terms, conditions and agreements of said contract during the term of said contract with or without notice to the Surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of

and concern to any such modifications being hereby waived by the Surety, then this obligation to be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, The parties hereto, by their authorized officers, have signed and sealed this bond this 5th day of August, 1975.

In presence of:

/s/ Illegible
Secretary

Attest:

/s/ Illegible
Secretary

THE RESOURCE SCIENCES CORPORATION

Principal

By: /s/ Charles T. Ray [SEAL]

WILLIAMS BROTHERS ENGINEERING COMPANY

By: /s/ Illegible
Title: Vice President

FEDERAL INSURANCE COMPANY

Surety

[SEAL]

Attest Witness:

/s/ Frances Tiederman
FRANCES TIEDERMAN, Secretary
(MARSH & MCLENNAN, INC.,
1579 East 21st Street,
Tulsa, Oklahoma #74114)

By: /s/ J. H. Taylor
J. H. TAYLOR
Title: Attorney-in-Fact
(MARSH & MCLELLAN, INC.,
1579 East 21st Street,
Tulsa, Oklahoma #74114)

(Usual acknowledgement and corporate authority of Principal and Surety to be atached to each copy of this Bond. NOTE TO SURETY: If this Bond is not signed by a corporate officer, a copy of the Power of Attorney for the person signing shall be attached to each copy of this Bond.)

DEPARTMENT OF THE NAVY
NAVAL PETROLEUM RESERVES IN CALIFORNIA
POST OFFICE BOX 11, TUPMAN, CALIFORNIA 93276
TELEPHONE (TAFT, CALIF.) 763-4131

NOd-10068
Serial: 1859
5 NOV 1976

From: Officer in Charge, Naval Petroleum Reserves in California
To: General Manager, UO-NPR #1 (Elk Hills)

Subj: Performance Bond of WBEC

Ref: (a) Operating Agreement Contract NOd-10068

1. Williams Brothers Engineering Company obtained from Federal Insurance Company a performance bond, penal sum of $5,000,000, to cover its operations under reference (a). The cost of the bond was $125,000 for a term of five years.

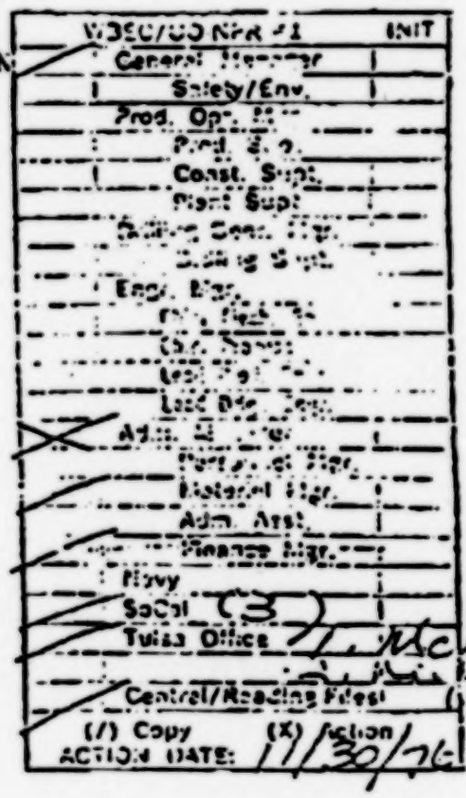
2. Reference (a) has now been renewed until 30 September 1977. WBEC is directed to cancel the three years beyond 30 September 1977 remaining on the performance bond and refund to Navy that part of the $125,000 premium which is refunded to WBEC by Federal Insurance Company.

3. WBEC is requested to report in writing what action it has taken on this matter by 30 November 1976.

R. G. MARTIN

Copy to:
DNPR
Operating Committee





ATTACHMENT 2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed March 6, 1989)

Defendant hereby replies to Plaintiff's Opposition to Defendants' Motion for summary Judgment. In its Opposition, the United States unfortunately confuses issues, makes arguments which are inconsistent with the facts in this case and consequently puts more heat than light on the issues before the Court. The United States argues that although the Williams Brothers Engineering Company ("WBEC") contract with Navy/DOE states that the operator [WBEC]" . . . will construct and maintain facilities" that language does not mean what its words say. This is the United States' approach throughout. Contrary to the wording of the contract, the United States argues that WBEC actually was prohibited from construction. Yet, there is no citation to the contract made by the United States that supports that proposition.

The United States also confuses the issues with respect to its argument on the application of the doctrine of Res Judicata/Collateral Estoppel. The doctrine goes to the question of whether the *state court actions* are the same, whether there is privity between WBEC and the United States, and whether the state court actions have been finally disposed of on the merits. The United States attempts to avoid the real issue by arguing that the

United States has a six-year Statute of Limitations under title 28 United States Code Section 2415. But in analyzing the Res Judicata/Collateral Estoppel issue, the Court must only be concerned with the state court actions. The Statute of Limitations for the United States to bring this federal action is another and different issue.

The United States also confuses the issues in its argument on the Statute of Limitations found in Title 28 United States Code Section 2415. The United States argues that the dates of a state administrative process for refund of taxes is the dates the federal Statute of Limitations begins to run on a quasi-contract action. The question to be resolved is when the United States can *first* sue the State of California for unjust enrichment. The fact is that it can first sue under Title 28 United States Code, Section 2415 on the date the money is paid to the State and there can be no extension of this time merely because WBEC was going through an administrative process which was a necessary prelude to a state court refund of taxes action.

ARGUMENT

I

THE PRINCIPLES OF RES JUDICATA/ COLLATERAL ESTOPPEL MANDATE DISMISSAL OF THIS CASE

There is no doubt that the principles of Res Judicata/ Collateral Estoppel apply to actions by the United States. See *Montana* v. *United States*, 440 U.S. 147 (1979). Under those principles a final judgment on the merits bars further claims by the parties or their privies upon the same cause of action. The United States does not contest the privity between WBEC in the state court actions and the United States. Similarly, the United States does not contest the fact that the causes of action are the same here as in the state court actions.

The only United States argument to the application of these principles is that the state court cases were not final determinations on the merits *because* those causes were dismissed "without prejudice" *and* the federal Statute of Limitations of 28 United States Code section 2415 allows the United States to bring this action. But here the United States is confusing the preclusive effect of Res Judicata Collateral Estoppel with statute of limitations restrictions. The two are wholly separate and independent issues.

The error of the United States is that it interprets the words "without prejudice" as meaning to give permission to another entity to bring another lawsuit upon the identical cause of action. If this were the real meaning then a dismissal "without prejudice" would overcome a Res Judicata/Collateral Estoppel argument in every case. Obviously, the term "without prejudice" in section 581 of the Code of Civil Procedure cannot be read so broadly. All that the term means is that the same suit by the same parties may be brought at a later date. As pointed out in Defendants' Memorandum of Points land Authorities, this cannot and does not give permission for the same lawsuit by the same parties if the statute of limitations on a second suit has run. Otherwise, the term "without prejudice" would be viewed as an indefinite extension of the statute of limitations on the second suit. Because the United States' position leads to such absurd results, this Court cannot seriously consider its argument as correctly stating the law.

The case of *King v. Superior Court*, 12 Cal.App.2d 501 (1936), dealt with a dismissal without prejudice filed at or during trial. The Court, on technical grounds, held that the dismissal was filed before trial, which puts it on the same plane as the dismissals in the WBEC state court cases. The *King* court stated the effect of the dismissal:

> ". . . has the effect of terminating it [the litigation] and the rights of the parties as affected by that particular action are concluded as the case had been determined on the merits though it is not a bar to a new action." *Id.* at p. 507.

Thus, a dismissal without prejudice is a determination on the merits but does not, by itself, bar a new action. If no new action is filed, then it is a determination on the merits. Similarly, if no new action may be filed because the statute of limitations has passed, the effect is the same. The United States ignores the dual test involved here: (1) Whether the dismissal itself bars a new action, and (2) whether a new action may be brought under the State Statute of Limitations by the same parties on the same cause of action. A dismissal with prejudice, by itself, bars a new action,[1] and when there has been a dismissal without prejudice *and* the running of the statute of limitations on a new action, it is clear that the effect is the same as a dismissal with prejudice.

It is clear that the state court actions concerned the same cause of action, that the United States was in privity with the plaintiff in the state court actions and the dismissal was a final determination on the merits. The United States is barred by the principles of Res Judicata/ Collateral Estoppel from bringing this suit.

The defendants' argument on Res Judicata/Collateral Estoppel is very clear. The state court actions were a final disposition on the merits because another state court action could not have been brought by WBEC on behalf of the United States. In making its argument, the United States ignores the effect of the privity between WBEC and the United States. Because of the strong showing of

[1] If the state court cases had been dismissed "with prejudice" it would be expected that the United States would take the position such a dismissal would not bar this suit because it is a different suit brought by a different party.

privity in Defendants' Cross-Motion for Summary Judgment, the United States is bound by the state court determination. The fact that under different conditions a quasi-contract action may be brought by the United States within six years of payment does not help the United States. The real issue is whether the United States is precluded by the principles of Res Judicata/ Collateral Estoppel from bringing this action.

II

WBEC WAS A CONSTRUCTION CONTRACTOR UNDER THE CONTRACT BETWEEN WBEC AND NAVY/DOE

The United States begins its analysis of whether WBEC is a contractor with an inapplicable premise. It states that there is no tax on retail sales to the government under Revenue and Taxation Code section 6381. The United States then states that this exclusion isn't available to construction contractors under Title 18, California Administrative Code, Regulation 1521. The United States then argues that the reason the transactions at issue herein are not taxable is that this restriction on taxing retail sales to the government becomes available to WBEC because it is not a construction contractor.

The United States' reliance on *Lockheed Aircraft v. State Board of Equalization*, 81 Cal.App.3d 257 (1978) is misplaced. *Lockheed* concerned only the transfer of personal property to the United States and the *Lockheed* Court held that Lockheed purchased the personal property for resale in its regular course of business. Lockheed was thus exempt from sales tax under California Revenue and Taxation Code section 6381.

The case at bar, however, concerns not section 6381 of the Revenue and Taxation Code but section 6384 of the Revenue and Taxation Code. In order to obtain the exclusion of Revenue and Taxation Code-section 6381, the

contract, as did the contract in *Lockheed*, must provide that personal property is being sold. That is not the case here. As held in the case of *C. R. Fedrick, Inc. v. State Board of Equalization*, 38 Cal.App.3d 385 (1974), there is a different tax treatment for contractors dealing with real property and in order to determine the correct rule of taxability one must distinguish real property from personal property. See also *Chula Vista Electric Co. v. State Bd. of Equalization*, 53 Cal.App.3d 445 (1974). Under regulation 1521, both United States contractors and private contractors are treated as retailers of machinery and equipment and consumers of materials. As to fixtures the United States contractor is treated as the consumer and a private contractor is treated as a retailer. The difference in tax treatment is that when one is a consumer of materials and fixtures a tax applies on the sale from the third party vendor to the contractor and when one is a retailer of machinery and equipment the tax applies on the transfer from the contractor to the owner. These principles have been upheld in *In re Howell*, 731 F.2d 624, 626 (9th Cir. 1984). Thus, the United States is essentially arguing that if WBEC is *not* a construction contractor because of its non-responsibility for final affixation or installation, then the contract is converted into one that provides for the selling of personal property to the United States government by WBEC. It would be error to read the contract before this Court as so providing.

The contract by its terms is either a construction contract or a contract ot resell personal property to the United States, there is no middle ground. In the case at bar, WBEC purchased personal property from wholesalers and instead of reselling to the United States Government as a retailer, WBEC incorporated this purchased personal property into real property owned by the United States. WBEC acted in this instance like any other contractor affixing personal property to real property. The California Sales Tax Law in this instance requires that the sales tax to be paid on the WBEC's purchase of the personal property from the vendors or for WBEC to pay a tax on items affixed to real property as the consumer of the property. This has been upheld by California and United States courts.

Thus when personal property becomes affixed to real property, the tax is not on retail sale to a consumer, but on the contractor as consumer of the materials because the personal property has been used up in its affixing to the real property. WBEC was not in the business of selling property to the United States government and the WBEC contract makes this clear.

Why does the United States even raise this as a question? The obvious reason is that the real issue as pointed out in Defendants' Opposition is whether the property included in these transactions were taxable to WBEC under the principles enunicated in *United States v. New Mexico*, 455 U.S. 720 (1982). The United States has decided it cannot use the *New Mexico* test to exempt these transactions and it is only through the inappropriate analogy to retail sales to the federal government, that the United States can justify arguing for WBEC's non-taxability. However, in this case the tax falls on WBEC, not an instrumentality of the United States, because WBEC issued exemption certificates to its third party suppliers. The transactions are not exempt from taxation, the only question is at what point the tax is to be paid; by the vendors or by WBEC. By its actions of issuing exemption certificates to its third party suppliers WBEC has resolved this question.

The United States admits that improvements to real property were made by arguing that the improvements were made by subcontractors. Thus, the United States admits that the regulation 1521 comes into play. But its argument that WBEC does not owe the tax results in complete non-taxability of a situation covered by regulation 1521. If WBEC is not a construction contractor,

then the third party suppliers indeed are exempt from tax on the sale of property to such entity performing work for the United States. The only other entity available to tax, the subcontractors, cannot be liable for the sales tax because the subcontractors made no purchase of materials which is the activation device for the sales/use tax liability. The result is that improvements to real property covered by regulation 1521 becomes completely non-taxable in spite of the numerous court decisions upholding the tax. This result would be error.

The United States engaged in sophistry and semantic games in order to avoid the characterization of WBEC as a construction contractor. On page 6 of its Opposition, the United States describes as baseless the defendants' contention that the contract itself must expressly state that the contractor is not responsible for affixation of property. The reason given is that regulations require only that under the construction *contract* the person not be responsible for the affixation or installation. The United States never explains the difference between what is an "express" statement of non-responsibility and non-responsibility "under the construction contract." These appear to defendant to be identical standards.

The United States' argument against WBEC being a construction contractor is basically that the construction contract was not performed as written. In all of its citations to the contract, not one supports the United States position that "Under the Construction Contract" WBEC was not responsible for the final affixation or installation of the property. For example, the citations by the United States to attachment 12 of the Harbert Declaration, Section LV, does not support the proposition that WBEC was not responsible for the final affixation or installation. That section is an extremely limited non-responsibility. As pointed out in Defendants' Opposition, page 8, subdivision A of this section states that WBEC is not responsible only for loss or damage to property *after* the government accepts the services. Subdivision

(b) of Section LV even removes this limited provision if WBEC or its officers act willfully or in bad faith. This does not amount to being not responsible for final affixation or installation "under the Construction Contract."

In fact, as pointed out in Defendants' Opposition on page 7, attachment 11 to the Harbert Declaration refers to WBEC as the contractor who must be satisfied that the job has been properly completed. In addition, attachment 4 to the Harbert Declaration provides:

> ". . . if the proposal includes work to be done by the contractor's personnel which is likely to involve a total cost in excess of $2,500 or such other amount as the operating committee . . . may from time to time establish, Director-NPRC, or his designee, prior to accepting or rejecting the proposal, *may* require the contractor to secure competitive bids." Emphasis added.

This is not a contractual provision which shows that "under the contract" WBEC had no responsibility. It merely shows that WBEC had to comply with the direction of its principal, a common contractual obligation.

The crux of the United States' argument seems to be that all *activity* undertaken by WBEC was done solely at the direction of the operating committee. See Plaintiff's Opposition, page 7, lines 9-10. Even if this is true, and it is not explicit in the contract, it does not amount to non-responsibility for final affixation or installation "under the contract."

The United States finishes its argument in its Opposition by arguing the words in the contract do not mean what they say. First, it says that section XII(b) of the contract is merely a transition provision. But this section provides as follows:

> ". . . *OPERATOR* covenants to undertake primary responsibility for all services hereby contracted for at midnight November 13, 1975."

See Meeks Declaration, attachment 2, page 22. What this section provides is a promise by WBEC to take primary responsibility for all activity after November 13, 1975. To say that this section is merely a transition provision is a gross misstatement of its effect.

In addition the United States takes issue with defendants' reliance upon the amendment to the subcontracts which refer to WBEC as the "prime contractor" as indicating its ultimate responsibility. But here again the United States' argument confuses the issues. The United States in its Opposition states that the intention of the amendment was to more accurately describe the contractual relationship of the Navy/DOE and WBEC. The Board believes this is true, that the term "prime contractor" does accurately describe WBEC's position under this contract. But, the United States argues the term "prime contractor" doesn't mean in this contract the same thing as in the construction industry. In addition, even though the subcontractors are referred to in the contract as subcontractors, the United States argues they were really not subcontractors, but were simply third parties who performed work. Thus, the United States argues that WBEC was not a prime contractor and that the subcontractors were not subcontractors of WBEC because WBEC was not responsible for anything. They make this argument in spite of the fact that the contract and the subcontracts refer to WBEC as the prime contractor and the third parties as subcontractors.

The United States' argument that the contract between WBEC and Navy DOE doesn't mean what it says cannot be take at face value. The United States asks this Court to issue a declaratory judgment on the meaning of the contract. Thus, when it argues that the contract doesn't mean what it says it is actually arguing against a declaratory judgment on the meaning of the contract. In addition, the inability of the United States to cite any provision of the contract which clearly provides that WBEC has no responsibility for affixation or installation

of property, means that any declaratory judgment on the meaning of the contract must be issued against the United States. The fact that the contract clearly provides that WBEC has the responsibility for affixation or installation of property mandates the granting of Defendants' Motion for Summary Judgment.

III

THE UNITED STATES IS BARRED BY TITLE 28 UNITED STATES CODE SECTION 2415 FROM RECOVERING THE PAYMENT MADE BY WBEC ON APRIL 29, 1982

The United States seeks to avoid the application of the Statute of Limitations by selecting certain portions of WBEC's state administrative appeal in an attempt to enlarge the time within which suit must be brought. The first questions that arises from this approach is whether WBEC's use of the state administrative process has any relationships to the right of the United States to bring suit under 28 United States Code section 2415.

WBEC has been shown to be the taxpayer in this action and as such filed the state court suits, acting on behalf of and under the direction of, the United States because the United States reimbursed WBEC for the taxes paid. But the right of the United States to recover in this action is not based upon the right to a *tax refund*, but to prevent the State of California from becoming unjustry enriched in a quasi-contract action. *U.S. v. State of Mich.*, 851 F.2d 803, 810 (6th Cir. 1988). This is so even if the United States phrased the complaint in terms of a tax refund.[2]

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[2] This is not a tax refund action because the State of California is constitutionally prohibited from taxing the United States or its instrumentalities. There is no allegation by the United States that the incidence of the tax fell on the United States or that WBEC

WBEC sought a refund of taxes through the proper state channels and the United States now seeks recovery of its reimbursed taxes to WBEC under a quasi-contract basis. There can be no extension of the United States' right to recover on this basis by WBEC's state administrative appeal. The only question, therefore, is when the United States can first sue the State of California on a quasi-contract theory. A related question is whether the United States was prevented, in some way, from suing the State of California on a quasi-contract theory because WBEC had not completed the state administrative process for a tax refund.

The answer to these questions is the United States could have sued at any time after the money had been paid to the state. Federal courts have often defined when the cause of action accrues under 28 United States Code section 2415(a). The holdings are consistent that the cause of action under this provision accrues upon payment. *United States v. Beck*, 758 F.2d 1553, 1558 (11th Cir. 1985); *United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984); *United States v. De Kalb County*, 729 F.2d 738 (11th Cir. 1984); *United States v. Robert's Nursing Home, Inc.*, 710 F.2d 1275, 1279 (7th Cir. 1983); *United States v. Bellard*, 674 F.2d 330 (5th Cir. 1982); *United States v. Limbs*, 524 F.2d 799, 801 (9th Cir. 1975); *United States v. Skidmore, Owings & Merrill*, 505 F.Supp. 1101, 1104-1105 (S.D.N.Y. 1981). The fact is that the United States could have sued at any time after payment was made and that is the necessary accrual of a cause of action under 28 United States Code section 2415(a). This is precisely what the *State of Michigan* court stated.

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is a federal instrumentality under *United States v. New Mexico*, *supra*, 455 U.S. In fact, the sole basis of the United States' argument is that WBEC is not a construction contractor under *California law*.

The United States misperceives the effect of the statutes surrounding the state administrative process. It cites the provision of California Revenue and Taxation Code section 6564 that the order or decision of the Board upon a petition for redetermination becomes final 30 days after service upon petitioner. The consequence of this finality is that the amount becomes *due* and *payable* at the time the redetermination becomes final. In this case, the notice of redetermination was issued and served on April 13, 1982, for the amounts alleged in paragraph 16 of the Complaint. See Declaration of Donald Hennessy, Exhibit F. Under California Revenue and Taxation Code section 6565, the amounts became due and payable on May 13, 1982, *if* there had been no payment. But WBEC chose to make the payment on April 29, 1982. The United States may be correct in its assertions if payment had been delayed until May 13, 1988, and became due and payable upon finality. But the issue would have been precisely the same: When was payment made? The fact that WBEC chose to pay the taxes on April 29, 1982, makes the notice of redetermination final on that date.

Nor can the United States prevail upon its argument that it is the denial of the claim for refund that begins the statute of limitations of 28 United States Code section 2415(a). The cases have not only held that the cause of action accrues upon payment, but that it is not tolled by administrative hearings for the fixing of liability. *United States v. Beck*, *supra*, 758 F.2d 1553, 1558; *United States v. Kass*, *supra*, 740 F.2d 1493, 1497; *United States v. Robert's Nursing Home, Inc.*, *supra*, 710 F.2d 1275, 1279; *United States v. Skidmore, Owings, & Merrill*, *supra*, 505 F.Supp. 1101, 1104-1105. These cases concern situations where the United States must go through an administrative process. In the case at bar, the state administrative process for taxes does not apply to the United States' quasi-contract action.

In this argument, the United States confuses its rights and remedies with those of WBEC. This action, however, stands on its own as a quasi-contractual action for unjust enrichment. The United States' argument that the state statutes concerning state tax administrative process has some bearing on the statute of limitations faced by the United States in bringing this suit must be rejected.

CONCLUSION

Throughout this litigation, the United States has presented to this Court a classic example of *Ipse Dixit*, things are the way it describes only because it says so. The United States has a paucity of citations to cases supporting their legal position and their arguments on the meaning of the contract in issue are, in fact, shown to be wrong by the contract itself. Defendants request this Court to grant defendants' motion for summary judgment.

The first reason for granting the defendants' motion is that the privity shown between WBEC and the United States in the state court cases prevent the United States from relitigating the same question in a different court under the principles of Res Judicata/Collateral Estoppel. The second reason for granting the Board's motion for summary judgment is that the Board has shown that the contract between WBEC and Navy/DOE is a construction contract. In addition, the United States has not shown that WBEC meets the exclusion for non-responsibility for affixing or installing property. There is no doubt that WBEC, in fact, has such responsibility. If this Court should find that this action is not precluded by the doctrine of Res Judicata and finds that the contract is *not* a construction contract, then this Court must refuse to grant the United States a refund for the amount alleged in paragraph 16 of the Complaint because as to that payment, the United States did not sue within the applicable statute of limitations.

DATED: March 6, 1989

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

ROBERT F. TYLER
Supervising Deputy
Attorney General

By: /s/ Robert D. Milam
ROBERT D. MILAM
Deputy Attorney General

Attorneys for Defendants

SUPREME COURT OF THE UNITED STATES

No. 91-2003

UNITED STATES, PETITIONER

v.

CALIFORNIA AND CALIFORNIA STATE BOARD OF EQUALIZATION

ORDER ALLOWING CERTIORARI. Filed October 5, 1992.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

October 5, 1992

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No. 91-2003

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

DAVID ENGLISH CARMACK
JOHN J. MCCARTHY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, in invoking the federal cause of action for money had and received (*indebitatus assumpsit*) to recover state taxes unlawfully collected from a federal contractor, the United States must comply with state-law requirements (i) that an administrative tax refund claim be filed as a precondition to suit for refund (Cal. Rev. & Tax. Code § 6932 (West 1987)) and (ii) that suit for refund be commenced within 90 days of the administrative denial of the refund claim (Cal. Rev. & Tax. Code § 6933 (West 1987)).

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 932 F.2d 1346. The opinion of the district court (Pet. App. 16a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a) was entered on May 16, 1991. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on March 18, 1992 (Pet. App. 24a). The petition for a writ of certiorari was filed on

June 12, 1992, and was granted on October 5, 1992. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1345 provides, in relevant part:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States * * *.

2. 28 U.S.C. 2415(a) provides, in relevant part:

> * * * [E]xcept as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues * * *.

3. Cal. Rev. & Tax. Code § 6932 (West 1987) provides, in relevant part:

> No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed * * *.

4. Cal. Rev. & Tax. Code § 6933 (West 1987) provides, in relevant part:

> Within 90 days after the mailing of the [Equalization Board's] action upon a [refund] claim * * *, the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in any city or city and county of this state in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> Failure to bring action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

STATEMENT

Invoking the federal common law cause of action for money had and received (*indebitatus assumpsit*), the United States seeks to recover approximately $11 million in California sales and use taxes paid by the manager of Naval Petroleum Reserve No. 1 with funds supplied by the United States (Pet. App. 2a-3a).

1. Naval Petroleum Reserve No. 1 (the Reserve) is one of three Naval Petroleum Reserves established by the United States.[1] Located in Kern County, California, the Reserve is operated by the United States under a Unit Plan Contract that encompasses property owned by the United States and by Chevron U.S.A., Inc. (J.A. 138-139).[2] The Unit Plan Contract, which was adopted pursuant to the requirements

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[1] The Naval Petroleum Reserves were established pursuant to Section 1 of the Pickett Act of 1910, ch. 421, 36 Stat. 847 (43 U.S.C. 141), which was repealed and replaced by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744 (43 U.S.C. 1701 *et seq.*). Authority to administer NPR-1 was originally conferred on the Department of the Navy (10 U.S.C. 7420-7438; Exec. Order No. 4614 (Mar. 17, 1927)). On October 1, 1977, this authority was transferred to the Department of Energy (42 U.S.C. 7156).

[2] Approximately 80% of the lands covered by the unit agreement are owned by the United States. Approximately 20% are owned by Chevron. J.A. 139.

of 10 U.S.C. 7426,[3] provides that the United States (i) retains "exclusive control over the exploration, prospecting, development, and operation of the Reserve" (J.A. 140) and (ii) is authorized to conduct activities at the Reserve with its own personnel or "contract for all or any part of such exploration, prospecting, development, and/or operation" (J.A. 141).

Between 1977 and 1985, the United States contracted with Williams Brothers Engineering Company (WBEC) for operation and management of the Reserve.[4] WBEC was thus the government's management contractor for the entire period of the dispute in this case (Pet. App. 2a).

WBEC managed the Reserve under "cost plus" contracts with the United States. Under these contracts, the United States paid WBEC a management fee and, in addition, reimbursed WBEC for the costs it incurred in managing the facility (J.A. 141-142, 150-151, 169). The reimbursable costs specifically included any sales or use taxes assessed in connection with WBEC's management of the Reserve (*ibid.*).

Acting pursuant to federal procurement policies and procedures, WBEC procured goods and services

[3] This statute authorizes adoption of "joint, unit, or other cooperative plans of exploration, prospecting, conservation, development, use, and operation of lands owned or controlled by the United States inside Naval Petroleum Reserve Numbered 1" with adjacent lands "owned or leased by private interests." 10 U.S.C. 7426(a).

[4] WBEC was engaged as manager of the Reserve by the Department of the Navy from 1975 to 1977. When responsibility for the Reserve was transferred to the Department of Energy in 1977, WBEC was retained as manager until August 1, 1985. Pet. App. 2a.

for operation of the Reserve (J.A. 145-151). WBEC had no ownership interest in any of the materials that it purchased for use at the Reserve. The title to all such materials passed directly from the vendor to the United States (J.A. 142, 145-147). These materials were thereafter used by the United States, or by the subcontractors engaged by WBEC under the directions of the United States, in conducting oil field operations at the Reserve (*ibid.*).

As manager, WBEC was prohibited from performing any construction work at the Reserve (J.A. 143, 147, 156). The contractors who performed construction work at the Reserve were hired by WBEC, subject to the government's approval. WBEC was not financially responsible for the performance of subcontractors or for completion of their work. The federal government, not WBEC, bore the risk of subcontractor performance. WBEC monitored subcontractors to ensure compliance with approved plans, but WBEC could not direct subcontractors to take any specific actions without authorization from the United States. The costs of corrective actions—including the increased costs of labor or materials or the costs of settling claims or conducting litigation—were paid by the United States (J.A. 146-150, 169-170).

2. For the years 1975 through 1981, the State of California assessed sales and use taxes in the amount of $14,136,853 for purchases of personal property that WBEC made in the name of the United States for use at the Reserve (Pet. App. 16a; J.A. 151).[5]

[5] Assessments for the years 1975 through 1977 were made on July 5, 1978. Assessments for the years 1978 through 1981 were made on December 13, 1982. J.A. 151.

These assessments were made under Section 6384 of the California Revenue and Taxation Code (the California Code), which taxes sales of personal property to federal contractors "for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State." Cal. Rev. & Tax. Code § 6384 (West 1987). Although the statutory incidence of the tax was on WBEC, the sales to which the tax was applied were of property acquired by the United States.

WBEC applied to the California Board of Equalization for administrative redetermination of the assessments pursuant to Section 6932 of the California Code (Pet. App. 2a, 18a-19a). WBEC contended that, under its contracts with the United States, WBEC would not, and did not, use the property purchased for "the construction of improvements." The purchases were therefore outside the scope of the State's tax provision (Pet. App. 2a). The California Board of Equalization made minor adjustments to the assessments but otherwise rejected WBEC's claims. WBEC then paid the resulting assessments under protest, with funds provided by the United States pursuant to the management contracts (*ibid*; J.A. 142-143, 150-151).

WBEC thereafter filed timely administrative claims for refund, again arguing that the sales were not subject to the California tax because WBEC did not use the property for the construction of improvements (Pet. App. 2a). After the refund claims were denied, WBEC commenced timely actions in state court for refund of the taxes pursuant to Section 6933 of the California Code (Pet. App. 2a). The United States was not joined as a party to the state-court refund actions.

3. During the pendency of the state court proceedings, the State conceded that approximately $3 million of its assessments were invalid because the property involved had been used or installed by government personnel (Pet. App. 2a). The State therefore agreed to refund that portion of the taxes. The State continued to maintain, however, that the remaining $11 million it had assessed and collected—for personal property purchased for the United States by WBEC but installed by other contractors—was authorized under state law (*ibid.*).

By agreement of the parties, WBEC dismissed its state court actions without prejudice in January 1988. The validity of the remaining $11 million of the State's assessments, and of the claims for refund of that amount, was thus left unresolved (Pet. App. 2a).

4. The United States then filed this action in federal district court seeking: (i) a declaration that the California tax was inapplicable to WBEC's purchases of personal property for the United States because WBEC was not engaged in the "construction of improvements" as required by Section 6384 of the California Code; and (ii) a judgment for damages against the State in the amount of $11 million, plus interest, for money had and received under the State's invalid tax assessments (Pet. App. 2a-3a).

The district court granted summary judgment in favor of the State. The court first concluded that the United States had no right to recover the taxes under state law because the federal government had not made a timely administrative refund request (as required by Section 6932 of the California Code) and had not commenced this action within 90 days of the denial of the administrative refund claim filed by

WBEC (as required by Section 6933 of the California Code). The court concluded that compliance with these state procedures was "a condition precedent" to the State's liability in a statutory refund suit (Pet. App. 17a, quoting *United States* v. *California*, 655 F.2d 914, 918-919 (9th Cir. 1980)). In the court's view, compliance with these procedures was an "element of [the plaintiff's] cause of action" (Pet. App. 17a (quoting *United States* v. *California*, 655 F.2d at 918-919)). Because the United States had not complied with those procedures, the court concluded that the United States could not obtain recovery under the State's refund statute (Pet. App. 19a-20a & n.3).

The district court further concluded that the United States was not entitled to seek recovery of taxes from the State under the quasi-contractual common law cause of action for money had and received (*indebitatus assumpsit*). The court stated that an action in quasi-contract cannot be "stretched to include state taxes [paid] under a disputed state statute" (Pet. App. 21a). The court found no "unjust enrichment" of the State, even if the taxes were wrongfully collected, because there was no "unjustness in the state procedures" available for challenging the assessment (*id.* at 23a).

5. The court of appeals affirmed (Pet. App. 1a-15a). The court acknowledged that numerous decisions have held that the United States "may maintain a quasi-contract action independent of state law" for recovery of state-imposed taxes, but stated that those cases "involved classic cases of unjust enrichment" (*id.* at 9a). The court concluded that "[t]his case does not involve classic unjust enrichment such as simple overpayment" but, instead, is based upon "a

state-created exemption from a state created sales tax" (*ibid.*). The court held that any right of recovery in this situation was subject to compliance with state administrative procedures for refund claims and with the state-law requirement that an action for refund be commenced within 90 days of administrative denial of the refund claim (*id.* at 9a-10a, 12a). Since the United States had not complied with those procedures, the court concluded that the State's retention of the allegedly invalid tax did not represent an instance of "classic unjust enrichment" (*id.* at 14a).

In so ruling, the court acknowledged (Pet. App. 12a-14a) that the recent decision of the Eleventh Circuit in *United States* v. *Broward County*, 901 F.2d 1005 (1990), had reached the opposite conclusion on indistinguishable facts. In *Broward County*, the court of appeals concluded that the United States was entitled to recover invalid state taxes assessed against a federal contractor under the "federal common law cause of action in quasi-contract for money had and received" and that "the state statute [imposing a 60-day claim filing deadline] has no application to [that] action" (Pet. App. 13a (quoting *United States* v. *Broward County*, 901 F.2d at 1008-1009)). The Ninth Circuit stated that it disagreed with the Eleventh Circuit's decision in *Broward County* because "there was no unjust enrichment in * * * *Broward County*, and there is none in the case at bar" (Pet. App. 13a).

SUMMARY OF ARGUMENT

From its earliest decisions, this Court has recognized the common law action known as "money had and received" (*indebitatus assumpsit*), under which

a plaintiff may recover money belonging to him that the defendant holds without lawful right. This cause of action exists whether the defendant has received the money directly from the plaintiff or through a third party. One of the earliest applications of this quasi-contractual claim for relief in this Court was to provide a judicial remedy for the recovery of unlawfully exacted taxes. This Court has long recognized that the United States may invoke this federal common law cause of action—without regard to conflicting state-law procedures or remedies—to recover taxes and other funds unlawfully held by the States or others. The United States properly invoked this common law action here to recover the federal funds unlawfully obtained by the State from the federal contractor.

The court of appeals did not dispute (Pet. App. 9a) that a cause of action for "money had and received" exists in favor of the United States. Instead, the court concluded that this federal cause of action is unavailing when the State provides a state-law refund procedure with which the United States has not complied. The court's reasoning was this: If the United States has not pursued available state-law refund procedures, then the State's retention of unlawfully collected taxes does not represent "classic unjust enrichment" (*id.* 14a-15a). The court therefore concluded that the federal remedy is inapplicable in these circumstances (*ibid.*).

This reasoning conflicts with the long line of this Court's decisions holding that, when the United States brings suit to recover unlawfully exacted state taxes, its rights are not circumscribed or limited by state procedures, state statutes of limitations, or state

notions of laches. It is federal law, not state law, that provides procedures and rules of limitations for federal common law causes of action. Since the federal cause of action for money had and received is based upon a contract implied in law, it is subject to the six-year statute of limitations set forth in 28 U.S.C. 2415(a) for claims "brought by the United States * * * upon any contract * * * implied in law" (*ibid.*). The federal claim is not subject to conflicting or additional state limitations or procedural requirements.

In contrast to the decision below, other courts of appeals have consistently held (i) that the United States may invoke the federal common law action for "money had and received" to recover federal funds erroneously exacted from its contractor by a state or local government and (ii) that this claim is not subject to compliance with state procedures or state statutes of limitation. The contrary holding in this case—that the federal cause of action is subject to the restrictions applicable to the state-law cause of action—turns the Supremacy Clause on its head. The existence of a state remedy cannot preempt the federal remedy. The focus of the action for money had and received is upon the existence, or lack, of lawful right of the defendant to hold the plaintiff's money. The State cannot rely upon state-created procedures to avoid an accounting under federal law for its unlawful possession of money that rightfully belongs to the United States. Federal law creates, and governs, the right of the United States to recover its own funds.

The decision of the court of appeals would often leave the United States without an effective remedy to contest a tax improperly exacted from a federal

contractor for which the United States ultimately is responsible. Many States, including California, allow only the putative taxpayer, not third parties, to challenge improper state tax assessments. Even if the United States were allowed to challenge taxes imposed upon federal contractors before state agencies, the application of the differing rules and procedures of the 50 States to the federal claim would result in manifest confusion and undermine the ability of the United States to perfect its right to recover the large sums often at stake.

ARGUMENT

WHEN INVOKED BY THE UNITED STATES TO RECOVER FEDERAL FUNDS DISBURSED TO PAY UNLAWFUL STATE TAXES, THE FEDERAL COMMON LAW CAUSE OF ACTION FOR "MONEY HAD AND RECEIVED" IS NOT SUBJECT TO STATE-LAW REQUIREMENTS APPLICABLE TO STATE-LAW TAX REFUND SUITS

This case concerns the scope and nature of the remedy available to the United States for recovery of funds disbursed to pay unlawfully assessed state taxes. The right of the United States to recover federal funds improperly held by state governments or by others is a question of federal, not state, law:

> When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power * * *. The authority [to do so] had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws [of any State.] The duties imposed upon the United States and the rights acquired by it * * * find their roots in the same federal sources. In absence of an applicable

> Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.

United States v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (quoting *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943)). "[T]he right of the United States to seek legal redress for duly authorized proprietary transactions 'is a federal right, so that courts of the United States may formulate a rule of decision.'" *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) (quoting Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 410 (1964)). The federal courts are not "restricted to the remedies available in state courts in enforcing such federal rights." *Board of County Commissioners* v. *United States*, 308 U.S. 343, 350 (1939).

A. *Federal Common Law Provides A Cause Of Action To The United States For The Recovery Of Unlawfully Assessed State Taxes*

From its earliest decisions, this Court has recognized the common law cause of action for "money had and received" (*indebitatus assumpsit*), under which a plaintiff may recover money belonging to him that a defendant holds without lawful right. See, *e.g.*, *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) 137, 156-157 (1836); *Bend* v. *Hoyt*, 38 U.S. (13 Pet.) 263, 265-266 (1839); *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) 720, 731-732 (1866); *Dooley* v. *United States*, 182 U.S. 222, 228 (1901). See also *Moses* v. *Macpherlan*, 2 Burr. 1005, 1012, 96 Eng. Rep. 120, 120-121 (K.B. 1759) (Lord Mansfield); *United States* v. *Compagnie Generale Trans-*

atlantique, 26 F.2d 195 (2d Cir. 1928).[6] The Court has long held that the United States may employ this common law cause of action to recover federal funds unlawfully obtained by others.

For example, in *Bayne* v. *United States*, 93 U.S. 642 (1877), the Court held that this cause of action could be employed by the United States to recover money from a third party who received federal funds that had been misappropriated by a government agent (93 U.S. at 643):

> The law imposes on [the third party] an obligation, and implies a promise on its part, to refund the money to its owner. Such a promise can be enforced by action. Assumpsit will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obligated by natural justice and equity to refund.

In *United States* v. *Wurts*, 303 U.S. 414 (1938)—a suit brought by the United States to recover improperly refunded federal taxes—the Court stated that, under this federal common law action, the

[6] The elements of the common law action are: (1) that the defendant is indebted *ex aequo et bono* to the plaintiff in a certain sum on account of money received by the defendant to the use of the plaintiff; (2) that being so indebted, the defendant impliedly promised the plaintiff to pay him the sum on request; (3) that the defendant has refused to pay the sum; and (4) that, as a result, the plaintiff has been damaged. See C. Keigwin, *Cases in Common Law Pleading* 210-211 (2d ed. 1934); 2 *Andrew's American Law* 1263-1266 (2d ed. 1908); B. Shipman, *Handbook on Common-Law Pleading* 254-259 (3d ed. 1923); C. H. S. Fifoot, *History and Sources of the Common Law* 392-394 (1st ed. 1949).

United States is entitled to recover federal funds that have been "wrongfully, erroneously, or illegally paid." *Id.* at 415.

One of the earliest applications of this quasi-contractual claim for relief in this Court was to provide a judicial remedy for recovery of unlawfully exacted taxes. See *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) at 156-157; *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) at 731-732 (the "[a]ppropriate remedy to recover back money paid under protest on account of duties or taxes erroneously assessed, is an action of assumpsit for money had and received").[7] The right of the United States to invoke the cause of action for "money had and received" to recover taxes and other funds unlawfully held by the States or others is a "long-established right" (*United States* v. *Wurts*, 303 U.S. at 416). It arises

[7] Although the action for money had and received is often based upon a mistaken or fraudulent payment (see, *e.g.*, *United States* v. *Wurts*, 303 U.S. 414, 416 (1938); *Bayne* v. *United States*, 93 U.S. at 643), the common law remedy is also applicable to "involuntary" tax payments made under "compulsion of law, or under protest, or with notice that [the plaintiff] intends to bring suit to test the validity of the [tax] claim." *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) at 731-732.

Because sovereign immunity barred the private taxpayer from suing the government itself for unlawfully collected taxes, the action of money had and received was maintained against the individual collector. See, *e.g.*, *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) at 731-732. Upon entering the Union, the States waived any claim of sovereign immunity with respect to claims asserted by the United States. *Board of County Commissioners* v. *United States*, 308 U.S. at 351; *United States* v. *Texas*, 143 U.S. 621, 626 (1892); *United States* v. *Nevada Tax Commission*, 439 F.2d 435 (9th Cir. 1971).

under federal common law: "[n]o statute is necessary to authorize the United States to sue in such a case." *Id.* at 415 (quoting *United States* v. *Bank of the Metropolis*, 40 U.S. (15 Pet.) 377, 401 (1841)). See also *United States* v. *Broward County*, 901 F.2d 1005, 1007 (11th Cir. 1990) (the "action sound[s] in *quasi-contractus* for the recovery of its treasury funds"); *United States* v. *Michigan*, 851 F.2d 803, 810 (6th Cir. 1988) (payments received under an invalid state tax result in "unjust enrichment" of the State and create a quasi-contractual obligation for the return of the funds); *United States* v. *Dekalb County*, 729 F.2d 738, 740 (11th Cir. 1984) (same). As the court of appeals stated in *City of New Orleans* v. *United States*, 371 F.2d 21, 28 (5th Cir. cert. denied, 387 U.S. 944 (1967)):

> [T]here is ample power in the [federal courts] to protect the sovereign against such unjust enrichment on familiar principles of money had and received. * * * This harmonizes with the usual principle that Federal law fashions remedies for recovery of funds or property of the United States—including those from invalid tax exactions.

This cause of action exists whether the defendant has received the money directly from the United States or through an intermediary or other third party. See *Gaines* v. *Miller*, 111 U.S. 395, 397 (1884); *Bayne* v. *United States*, 93 U.S. at 643; *Galante* v. *Commodity Credit Corp.*, 71 F. Supp. 963, 966 (S.D. Cal. 1947). It is sufficient for the United States to show that the funds equitably belong to it, even if they were paid to the defendant by another. *Bayne* v. *United States*, 93 U.S. at 643. The United

States may therefore invoke this federal cause of action to recover taxes improperly paid either directly or (as in this case) indirectly through its contractual reimbursement of federal agents or contractors. See, *e.g.*, *United States* v. *Broward County*, 901 F.2d at 1008; *United States* v. *Michigan*, 851 F.2d at 810; *United States* v. *Dekalb County*, 729 F.2d at 741; *City of New Orleans* v. *United States*, 371 F.2d at 28.

B. *The Federal Common Law Cause of Action Is Not Subject To State Statutes Of Limitation Or State Procedures Applicable To State-Law Tax Refund Suits*

The court of appeals did not dispute (Pet. App. 9a) that a cause of action for "money had and received" exists in favor of the United States. The court concluded, however, that this federal cause of action is unavailing when the State provides a state-law refund procedure with which the United States has not complied. The court reasoned that, when the United States has not pursued available state-law refund procedures, the State's retention of unlawfully collected taxes does not represent "classic unjust enrichment" (Pet. App. 14a-15a). Since the United States did not submit an administrative refund request to the State (as required by Section 32 of the California Code)[8] and did not commence a refund action "[w]ithin 90 days after the mailing" of the administrative disposition of such a refund claim (as required by Section 6933 of the California Code), the court of appeals concluded that the United States

[8] A refund request for these taxes was, however, submitted by the federal contractor. See Pet. App. 2a.

was not entitled to recover the state taxes *even if* they had been unlawfully imposed and collected by the State.[9]

1. The court's reasoning is fundamentally flawed. While state rules and procedures properly determine the scope and availability of state-law claims for recovery of taxes, the right of the United States to recover its funds arises under *federal* law. As this Court has stated, when the United States brings suit to recover unlawfully exacted states taxes, its rights are not circumscribed or limited by state procedures, "state statutes of limitations," or "state notions of laches" (*Board of County Comm'rs* v. *United States*, 308 U.S. at 351).

> It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.

United States v. *Summerlin*, 310 U.S. 414, 416 (1940). See also *United States* v. *John Hancock Mutual Life Ins. Co.*, 364 U.S. 301, 308 (1960).[10]

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[9] The court therefore did not consider, or decide, whether the State's tax had been properly imposed in this case. See notes 13 & 16, *infra*.

[10] The 90-day suit commencement provision under state law (Cal. Rev. & Tax Code § 6933 (West 1987)) does not purport to represent a "condition precedent" to the state-law refund action, as the district court erroneously concluded (Pet. App. 17a). Instead, it purports to effect "a waiver of any demand against the state" in the event that the action is not commenced within "the time specified" (Cal. Rev. & Tax. Code § 6933 (West 1987)). The waiver effected by this provision is precisely the type of state-law restriction on federal recoveries that this Court, and the courts of appeals, have refused to allow. See, *e.g.*, *Board of County Commissioners* v. *United States*, 308 U.S. at 349-351; *City of New Orleans* v. *United States*, 371 F.2d at 28.

Federal law provides the procedures and rules of limitation for federal common law causes of action. See *Board of County Commissioners* v. *United States*, 308 U.S. at 350-352. The federal cause of action for money had and received is based upon a contract "implie[d in law]" (*Bayne* v. *United States*, 93 U.S. at 643). That cause of action is therefore subject to the six-year statute of limitations in 28 U.S.C. 2415 (a) for claims "brought by the United States * * * upon any contract * * * implied in law" (*ibid.*). See *United States* v. *Broward County*, 901 F.2d at 1008; *United States* v. *Michigan*, 851 F.2d at 810. The federal claim is not subject to conflicting or additional state limitations or procedural requirements. *Ibid.* As this Court stated in *United States* v. *Summerlin*, 310 U.S. at 417 (citing *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U.S. 123, 126-127 (1919)):

> When the United States becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement.

The most common application of this federal common law cause of action is for the recovery of taxes improperly imposed by state and local governments on the United States or on its agents and contractors who are entitled to reimbursement from the United States.[11] Both prior and subsequent to the decision

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[11] In addition to the cases discussed in the text, see, *e.g.*, *United States* v. *Nye County*, 938 F.2d 1040 (9th Cir. 1991),

in this case, the courts of appeals have consistently concluded that the quasi-contractual claim for money had and received is *not* limited by the state procedures or state statutes of limitations applicable to state-law tax refund suits. See, *e.g.*, *United States* v. *Benton*, 975 F.2d 511, 513 n.1 (8th Cir. 1992); *United States* v. *Broward County*, 901 F.2d at 1008-1009; *United States* v. *DeKalb County*, 729 F.2d at 741-742; *City of New Orleans* v. *United States*, 371 F.2d at 28. See also *United States* v. *Michigan*, 851 F.2d at 810; *United States* v. *District of Columbia*, 669 F.2d 738, 741-742 (D.C. Cir. 1981); *United States* v. *Bureau of Revenue*, 291 F.2d 677, 678 (10th Cir. 1961).

For example, in *United States* v. *Broward County*, 901 F.2d at 1008, the Eleventh Circuit held that the claim of the United States for recovery of state taxes paid by a federal contractor was not subject to the state-law requirement that suit be commenced within 60 days of certification of the state tax rolls. The court stated (*id.* at 1008-1009):

> [T]he cause of action asserted by the government is not a state law judicial remedy or cause of action but is a federal common law cause of action in quasi-contract for money had and received. In these circumstances the state statute has no application to this action.

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cert. denied, 112 S. Ct. 1292 (1992); *United States* v. *City of Manassass*, 830 F.2d 530 (4th Cir. 1987), aff'd, 485 U.S. 1017 (1988); *United States* v. *Washington*, 654 F.2d 570 (9th Cir. 1981), rev'd on other grounds, 460 U.S. 536 (1983); *United States* v. *California State Board of Equalization*, 650 F.2d 1127 (9th Cir. 1981), aff'd, 456 U.S. 901 (1982).

Similarly, in *United States* v. *Dekalb County*, 729 F.2d at 741-742, the court rejected the contention that the federal cause of action to recover taxes improperly collected from a government contractor was subject to the state-law requirement that the taxes be paid under protest.[12] These and other courts of appeals have consistently concluded that state statutes of limitation and procedural restrictions have no application to the federal action for recovery of state taxes. To the contrary, it is the "usual principle that Federal law fashions remedies for recovery of funds or property of the United States—including those from invalid tax exactions" (*City of New Orleans* v. *United States*, 371 F.2d at 28).

2. In the present case, the court of appeals sought to distinguish these numerous decisions on the theory that the State is not "unjustly enriched" if the United States was entitled to, but did not pursue, an opportunity under state law to challenge the tax in state court (Pet. App. 9a, 13a). But it is not correct to characterize the State's retention of funds improperly obtained from the United States as "just" enrichment.[13] As this Court stated in *United States*

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[12] See also *United States* v. *Benton*, 975 F.2d at 513 n.1 (specifically rejecting the analysis adopted by the court of appeals in this case).

[13] If the contentions of the United States on the merits of the tax claim in this case are correct, the State is holding federal funds improperly obtained from the manager of federal property to pay taxes not legally owed to the State. Sales and use taxes are owed under the State's law only if WBEC purchased the property in question "for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State." Cal. Rev. & Tax. Code § 6384 (West 1987). Since

v. *Wurts*, federal common law allows the United States to recover federal funds that have been obtained "wrongfully, erroneously, or illegally" (303 U.S. at 415). The unlawful collection and retention of taxes by the State represents a classic example of "unjust enrichment of the state" (*United States* v. *Michigan*, 851 F.2d at 810) which the United States

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WBEC performed no construction work, the property could not reasonably be said to have been purchased for WBEC's "use in the performance of contracts with the United States for the construction of improvements." See *United States* v. *Anderson County*, 705 F.2d 184, 187 (6th Cir.), cert. denied, 464 U.S. 1017 (1983). See also note 16, *infra*.

The court of appeals erred in stating (Pet. App. 7a-8a) that this tax dispute involves solely a state law question and that no federal law or program is involved (*ibid.*). As we have pointed out (pages 3-5, *supra*), the Reserve is administered pursuant to 10 U.S.C. 7436 *et seq.*, and *all* disbursements of federal funds were necessarily made pursuant to federal law. Moreover, whether WBEC acquired the property "for use in the performance of contracts with the United States for the construction of improvements on or to real property" (Cal. Rev. & Tax Code § 6384 (West 1987)) requires an interpretation of the federal contracts. The interpretation of a federal contract presents an issue of federal law, just as does interpretation of the federal Constitution or of federal statutes. See *United States* v. *Kimbell Foods, Inc.*, 440 U.S. at 726; *United States* v. *County of Allegheny*, 322 U.S. 174, 183 (1944); *Clearfield Trust Co.* v. *United States*, 318 U.S. at 363. See also *United States* v. *Little Lake Misere Land Co.*, 412 U.S. at 592-593. But even if the pivotal question concerning application of the State's tax did *not* require interpretation of a federal contract, the federal common law action of money had and received would still be available for recovery of federal funds improperly obtained by the State. *E.g.*, *United States* v. *Broward County*, 901 F.2d at 1008; *United States* v. *DeKalb County*, 729 F.2d at 741.

may recover under the federal common law action for money had and received.

The decision in this case subordinates the "long-established right [of the United States] to sue for money wrongfully or erroneously paid from the public treasury" (303 U.S. at 416) to the state-law tax refund cause of action. In doing so, the decision turns the Supremacy Clause on its head. The existence of a state remedy cannot preempt a federal remedy for recovery of funds belonging to the United States.[14] Nor can the State rely upon state-created procedures to avoid an accounting under federal law for its unlawful possession of money belonging to the United States. As this Court has held, the rights of the United States to recover illegally collected state taxes may not "be unduly circumscribed by state law. * * * [S]tate notions of laches and state statutes of limitations have no applicability to suits by the Government" to recover its own funds. *Board of County Commissioners* v. *United States*, 308 U.S. at 351. Federal law, not state law, creates the right of the United States to recover its funds and establishes the limitations on the exercise of that right. See, *e.g.*, *United States* v. *Summerlin*, 310 U.S. at 416; *Board of Commissioners* v. *United States*, 308 U.S. at 351; pages 12-19, *supra*.[15]

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[14] The common law remedy of money had and received was never dependent upon the absence of other applicable remedies. The cause of action of money had and received was developed as a simplified alternative to the more cumbersome common law action of debt. J. Dawson & W. Harvey, *Contracts and Contract Remedies* 92-96 (2d ed. 1969); C. H. S. Fifoot, *supra*, at 363-369.

[15] *United States* v. *State of California*, 655 F.2d 914 (9th Cir. 1980), on which the court of appeals relied (Pet. App. 11a), is inapposite. In *State of California*, the United States

3. The court of appeals erred in suggesting (Pet. App. 9a) that the fact that the federal claim is for recovery of taxes that are unlawful under state law, rather than under federal law, is of relevance to this case. The federal cause of action for money had and received applies whenever federal funds have been "wrongfully, erroneously, or illegally paid" (*United*

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brought suit under Section 13009 of the California Health and Safety Code for recovery of fire suppression costs from persons whose negligence resulted in a forest fire. The recovery sought was wholly dependent upon Section 13009. Any recovery at common law, under the action of trespass on the case, would have resulted in damages measured by the injury to the land that would be substantially different from the fire suppression costs allowable under Section 13009. The United States sued California under the state statute, but failed to comply with administrative claim filing requirements in accordance with what the court found to be a statutory condition precedent to liability. The court held that, since the United States elected to pursue the substantive state statutory cause of action for fire suppression costs under Section 13009, it must satisfy all substantive conditions precedent to such a cause of action. In the present case, however, the United States has not invoked the state tax-refund statute as the basis for its claim for recovery. Rather, the United States has sued the State under the federal common law cause of action for money had and received, for the return of federal monies improperly paid to the State.

For this same reason, *United States* v. *Hartford Accident & Indemnity Co.*, 460 F.2d 17 (9th Cir. 1972), cited by the State (Br. in Opp. 14), is inapplicable. In that case, the court held that any action under California's Uninsured Motorist Law must comply with the statutory condition precedent that the suit be commenced within one year of the accident. The court stated that this one-year period was not a statute of limitations but was an essential element of the claim because, prior to the passage of the Uninsured Motorist Law, no person would have had a cause of action for the type of relief provided by the statute. 460 F.2d at 19.

States v. *Wurts*, 303 U.S. at 415). The fact that state law, rather than federal law, was violated in the erroneous assessment "does not change the nature of the cause of action [for money had and received] or limit the United States to state causes of action for this refund of taxes." *United States* v. *Broward County*, 901 F.2d at 1008.

The right of the United States under federal common law to recover its property when unlawfully taken directly from the United States or from its agents or contractors is not limited to state action that is unconstitutional, as the State contends (Br. in Opp. 2-3, 9). The United States may also invoke this federal common law remedy to recover property unlawfully taken by individuals (see, *e.g.*, *Bayne* v. *United States*, 93 U.S. at 643 (private misappropriation of federal funds)) or by state governments acting in violation of state law (see, *e.g.*, *United States* v. *Broward County*, 901 F.2d at 1008 (incorrect valuation of property under state tax law); *United States* v. *Dekalb County*, 729 F.2d at 741 (same)). The remedy is not limited to situations where the State's action violates the Constitution.[16]

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[16] The United States contends in this case that the State's assessment is invalid under state law because, in purchasing materials for the United States, WBEC did not itself use these materials in the construction of improvements on the federal property. See pages 5, 7, *supra*. The State's statute, on its face, purports only to tax a private contractor's "beneficial use of the property involved" (*United States* v. *New Mexico*, 455 U.S. 720, 741 (1982)). See Cal. Rev. & Tax. Code § 6384 (West 1987). We therefore have not contended that the state statute is facially unconstitutional. See *United States* v. *New Mexico*, 455 U.S. at 741-742.

If, however, notwithstanding its apparently plain language, the statute were interpreted to apply to purchases of prop-

4. The court of appeals' decision would often leave the United States without an effective remedy to contest a tax improperly exacted from a federal contractor for which the United States ultimately is responsible. Many States, including California (Cal. Rev. & Tax. Code § 6932 (West 1987)), require that an administrative claim be presented prior to initiation of a state refund suit. These States often allow only the putative taxpayer, not third parties, to file an administrative refund claim and challenge a tax assessment by a statutory refund suit. See *State Board of Equalization* v. *Superior Court*, 111 Cal. App. 3d 568 (1980)).[17] Other States condition any claim for refund on the requirement that the taxes be paid under protest. See *United States* v. *Dekalb County*, 729 F.2d at 741-742. Even if those States allowed the United States to protest the taxes imposed upon federal contractors, the United States cannot reasonably be expected to be aware of the tax (or the legal issues involved) in sufficient time to participate effec-

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erty for the United States by a federal contractor, such as WBEC, that did *not* make a "beneficial use of the property," the tax, as applied, would be an unconstitutional direct tax on the United States. See *United States* v. *New Mexico*, at 742. See also *Washington* v. *United States*, 460 U.S. 536, 543 (1983) (citing *United States* v. *City of Detroit*, 355 U.S. 466, 473-474 (1958)).

[17] Under 28 U.S.C. 1345, the federal district courts have jurisdiction over all suits commenced by the United States. *See Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470 (1976); *United States* v. *Lewisburg Area School Dist.*, 539 F.2d 301 (3d Cir. 1976). California, however, requires tax refund suits to be brought in the state courts. Cal. Rev. & Tax. Code § 6933 (West 1987). It is unclear which law the court of appeals concluded would apply.

tively in the state administrative process. Resort to the California state remedy in this case thus effectively requires the litigation to be waged by the federal contractor—a nominal party with no financial stake in the outcome[18]—instead of by the United States, the real party in interest.

If the state-law requirements for a state-created refund action were enforced upon the United States, the United States would thus often be deprived of its right to challenge and obtain recovery of taxes unlawfully exacted by the States. It is apparent that confusion would reign under the decision in this case if the United States were left to the laws of the 50 States—and to the diligence of disinterested federal contractors[19]—for enforcement of the federal government's claim for money had and received. In fashioning "remedies for recovery of funds or property of the United States" (*City of New Orleans* v. *United*

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[18] Since the United States is responsible for all taxes (see pages 4, 6, *supra*), the contractor obtains no benefit if the taxes are not due.

[19] In *United States* v. *Anderson County*, 761 F.2d 1169 (6th Cir.), cert. denied, 474 U.S. 919 (1985), the United States was permitted to challenge a tax assessment against Union Carbide, a federal contractor. The Sixth Circuit held that Union Carbide had no beneficial interest or use in the Department of Energy's nuclear facility at Oak Ridge, Tennessee, which had been subjected to the Tennessee tax. The court noted that Union Carbide had contradicted the United States' claims by alleging in separate tax proceedings in California that Union Carbide had exclusive possession and use of the nuclear facility, but the court concluded that this statement by Union Carbide was not binding on the United States. The *Anderson County* case is an example of the difficulty that the United States would have in relying upon a federal contractor to protect the government's interest in state tax proceedings.

States, 371 F.2d at 28), other courts have rightly and consistently rejected the suggestion that the sovereign interests of the United States should be subordinated to the vagaries of a mosaic patchwork of state procedures.

CONCLUSION

The judgment of the Ninth Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

DAVID ENGLISH CARMACK
JOHN J. MCCARTHY
Attorneys

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October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF CALIFORNIA and CALIFORNIA STATE BOARD OF EQUALIZATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS ON THE MERITS

DANIEL E. LUNGREN, Attorney General of the State of California
TIMOTHY G. LADDISH
Assistant Attorney General
ROBERT D. MILAM
Counsel of Record
Deputy Attorney General

P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5156

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 26 U.S.C. § 6532 provides in relevant part:

(a) Suits by taxpayers for refund.

> (1) General rule – no suit or proceeding under section 7422 (a) for the recovery of any internal revenue tax, penalty, or other sum shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates. . . .

2. California Constitution Article XIII, section 32 provides:

> No legal or equitable process shall issue in any proceeding in any court against this state or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

3. California Revenue and Taxation Code section 6902 provides in relevant part:

> (a) For taxpayers filing returns on other than an annual basis . . . no refund shall be approved by the board after three years from

> the last day of the month following the close of the quarterly period for which the overpayment was made. . . . For taxpayers filing returns on an annual basis . . . no refund shall be approved by the board after three years of the last day of the calendar month following the one year period for which the overpayment was made. . . .

SUMMARY OF ARGUMENT

In *United States v. New Mexico*, 455 U.S. 720 (1982), this Court changed the rules concerning state taxation of federal contractors. That case held that a federal contractor could not take advantage of the tax immunity of the United States unless the contractor was virtually a constituent part of the government. Prior to 1982, the rules in effect for a federal contractor challenge to a state tax required only that the state tax did not interfere with the performance of federal functions. Under the pre-1982 rules, when the issue of interference was raised, as it invariably was, the federal contractor could take advantage of the United States tax immunity if it proved its case. *In United States v. New Mexico*, this Court considerably narrowed the test for a federal contractor to be able to take advantage of the United States' tax immunity.

When, as in this case, the contractor does not meet the test in *United States v. New Mexico* for tax immunity, and the United States cannot sue on the basis of its own sovereign immunity from state taxation, the United States, like any other citizen or entity lacking a sovereign immunity defense, becomes subject to state law with regard to statutes of limitations, particularly when the

limitations provide a condition precedent for the continuing existence of a cause of action. The only cause of action that the United States can assert under California law is one based on subrogation. In such an action, the subrogee merely steps into the shoes of the subrogor, and if the subrogor had no cause of action when the subrogee's suit is filed, the subrogee has no cause of action. When the rights of the subrogor are extinguished, any rights of the subrogee are extinguished. The United States, as the subrogee of Williams Brothers Engineering Co., ("WBEC") had no cause of action when it filed suit in this case because WBEC's rights against respondents had expired.

The argument of the United States is that under the law in effect prior to this Court's decision in *United States v. New Mexico* the United States has a quasi-contract cause of action with a longer statute of limitations under federal law. While that argument may be correct if the federal contractor can take advantage of the United States tax immunity under the test enumerated in *New Mexico*, it ignores the fact that such immunity was not claimed and has not been shown in this case. The United States has no cause of action under federal law because it does not have a quasi-contract cause of action when, as here, the tax cannot be treated as having been imposed upon the United States in violation of the United States' sovereign immunity.

In relying on decisions providing the United States with an action in quasi-contract when the United States is to be treated as the taxpayer, the United States fails to recognize the inherent basis of this Court's decision in *United States v. New Mexico*.

ARGUMENT

I

THIS COURT'S DECISION IN *UNITED STATES v. NEW MEXICO*, 455 U.S. 720 (1982) CONTROLS THE ANALYSIS THAT MUST BE MADE IN THIS CASE

State taxation of federal instrumentalities has had a long history beginning with Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). "[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.* at 436. Subsequent decisions of this Court followed the *McCulloch* decision by holding that a state tax on income or assets a private party receives from a contract with the federal government imposed a burden on government operations. See *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829); *Dobbins v. Commissioners of Erie County*, 78 U.S. (11 Wall.) 113 (1871); see also discussion in *California Equalization Bd. v. Sierra Summit*, 490 U.S. 844, 848 (1989).

The case of *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) changed the ability of a federal contractor to claim the immunity from taxation that the government enjoys. This Court upheld a gross receipts tax imposed upon a federal contractor by West Virginia, holding that the tax did not interfere in any substantial way with the performance of federal functions. However, the *James* decision did not end the dispute regarding state taxation of federal contractors, because after 1937 the United

States and/or the contractor could claim that the relationship between the contractor and the government was such that the state tax did interfere with the performance of federal functions. *Id.* at 161.

This Court settled the controversy in *United States v. New Mexico*. In that case, this Court held that only one relationship could result in the contractor being able to take advantage of the United States, immunity: "[W]hen the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *Id.* at 735. *New Mexico* made it more difficult for federal contractors to claim the tax immunity of the United States. If the contractor can claim the tax immunity of the United States under the *New Mexico* rules, the law has not been changed. What has been changed is that for the first time there is a significant group of contractors where it cannot be alleged that the United States tax immunity applies. This case presents this Court, for the first time, with the question of what remedy the United States possesses when the federal contractor cannot claim the immunity of the United States.

If the federal contractor can come within the test of *New Mexico* and claim the tax immunity of the United States, there should be no doubt that a quasi-contract cause of action would arise in favor of the United States. The United States would be on solid legal ground, in that instance, to claim it had been damaged by the action of the state in exacting taxes on an exempt entity. *United States v. State of Mich.*, 851 F.2d 803 (6th Cir. 1988). In the case at bar, however, the United States has effectively

made no claim that the California tax is on the United States, nor does it claim that WBEC is an entity that is so closely connected to the government that the two cannot be viewed as separate entities. (Joint Appendix, hereafter "J. A." 5-11, 136-137, 153-154).

These rules, sometimes denominated the doctrine of intergovernmental immunities, were developed in order to navigate the potential mine field of clashing sovereignties. The national government is sovereign in its sphere of required activities, and the states retained some attributes of sovereignty upon entering the union. The states' power to tax for their own needs, without infringing upon the United States, was one of the attributes of sovereignty retained by the states. *Ohio Oil Co. v. Conway*, 281 U.S. 141, 159 (1930).

There is no question that this case does not involve the United States sovereign immunity, because the United States told the district court "[t]he defendants have also argued that there is no constitutional prohibition to the imposition of the tax on WBEC, but that issue was not raised in the plaintiff's complaint or motion for summary judgment and is not an issue in this case." J. A. 154; *United States v. State of California, et al.* 932 F.2d 1346, 1348 (9th Cir. 1991) (Pet. App. 4a, 5a, 6a). It has been held that the incidence of the tax under the California statute at issue in this case does not fall on the United States. *In re Howell*, 731 F.2d 624, 628 (9th Cir. 1984), *cert. den.* 469 U.S. 933; see also *United States v. California State Bd., etc.*, 683 F.2d 316 (9th Cir. 1982). The primary question in this action is whether the United States can state a cause of action for quasi-contract, and thus avail itself of the six-year statute of limitations contained in 28 U.S.C. § 2415, when the contractor, not the United States, is the true taxpayer.

II

THE UNITED STATES FAILS TO DEMONSTRATE THAT IT CAN RAISE ANY FEDERAL LAW CAUSE OF ACTION IN THIS CASE

While it may be agreed that 28 U.S.C. section 2415 provides for a six-year statute of limitations when a cause of action for a contract implied in law exists, that section does not create the cause of action. *Matheny v. Porter*, 158 F.2d. 478, 479 (10th Cir. 1946). A contract implied in law is termed a quasi-contract. *Baltimore & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1922). The foundation of a quasi-contractual cause of action is the concept that one party has been unjustly enriched at the expense of another party. *Reprosystem, B. V. v. SCM Corp.*, 727 F.2d 257, 263 (2nd Cir. 1984) *cert. den.* 469 U.S. 828; *Philpott v. Superior Court*, 1 Ca1.2d 512, 519, 36 P.2d 635, 640 (1934). It is the unjust enrichment that provides the foundational basis for an implied in law contract. *Major-Blakeney Corp. v. Jenkins*, 121 Cal.App.2d 325, 339, 263 P.2d 655, 664 (1953). The implied in law contract is a remedy of last resort in that a quasi-contract remedy is not available when other remedies are available. See *Randolph v. New England Mut. Life Ins. Co.*, 526 F.2d 1383, 1387 (6th Cir. 1975). Quasi-contract, therefore, is a remedy not easily obtained because it must resort to a fiction of the law which imputes a promise to perform a legal duty. *Baltimore & Ohio R. R. v. United States*, 261 U.S. 592 at 597; *P/B STCO, 213, ON 527 979*, 756 F.2d 364, 368 (5th Cir. 1985).

The United States has never explained how it has a quasi-contract cause of action in light of the holding of both the trial court (Pet. App. 20a) and the Ninth Circuit Court of Appeals (Pet. App. 9a and 13a) that respondents

were not unjustly enriched as that term is understood in the sense required to state a quasi-contract cause of action. *United States v. State of California,* 932 F.2d at 1350 (Pet. App. pp. 9a and 10a; Pet. App. 21a).[1] As will be seen below, the United States has another remedy available to it in this situation; the need for resorting to a fiction of the law does not arise.

The United States, relying on the historical quasi-contract cause of action, argues that respondents have "wrongfully appropriated" from the United States the taxes at issue in this case. The United States relies entirely upon cases which have facts which are distinguishable from the facts of this case. The United States relies upon (1) cases between a taxpayer and a taxing agency, (2) cases in which money was taken either mistakenly or fraudulently (i.e., wrongfully appropriated) without any color of compliance with the law, or (3) cases in which the tax imposed upon the taxpayer is, in essence, imposed upon the United States thereby violating its sovereign immunity. None of these relationships is present in this action.

The United States cites *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) for a general rule that federal law will be fashioned to govern the rights of the United States to seek legal redress for duly authorized

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[1] In its brief, the United States claims the Ninth Circuit Court of Appeals did not dispute the United States' cause of action. On the contrary, the Ninth Circuit held there was no unjust enrichment, the foundation of a quasi-contract cause of action. *United States v. State of California* 932 F.2d. 1346 at 1350 (Pet. App. 9a).

proprietary transactions. The holding in *Little Lake Misere* is not broad enough to cover this case. When no federal common law is applicable, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937); see discussion in *Powers v. United States Postal Service*, 671 F.2d 1041, 1043, 1044 (7th Cir. 1982). Thus, if the United States duly authorized proprietary relations are governed by the Federal Constitution or Acts of Congress, the courts will look to federal law. See *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). *Little Lake Misere* involved the question of whether Louisiana law could override the express terms of an agreement by which the United States acquired property under the authorization of the Migratory Bird Conservation Act. This court's *Little Lake Misere* decision reached a carefully circumscribed holding that the federal courts could fashion the governing rule of law when interpreting "a land acquisition agreement (a) explicitly authorized, though not precisely governed, by the Migratory Bird Conservation Act and (b) to which the United States itself is a party." *Id.* at 594.

In the present case, the federal courts are called upon to decide the correctness of a tax assessment (a) made under the California Sales and Use Tax Law, as enacted by the California Legislature and (b) as applied to a taxpayer which, under *United States v. New Mexico*, is to be treated as a separate entity from the United States. The federal contract between the United States and WBEC only provides the United States the opportunity to stand in the shoes of the taxpayer in challenging the respondents' interpretation of California law. The United States'

argument that the mere existence of that contract requires the federal courts to treat the United States as if it were the taxpayer is directly contrary to *United States v. New Mexico*.[2] Since *United States v. New Mexico* bars the United States from being treated as a direct party to the taxing transaction in this case, the United States is not entitled to the protection of *United States v. Little Lake Misere Co.*

Not only is the United States not a direct party to the taxing transaction between California and WBEC, the United States' interest in recouping its funds does not entail the same level of governmental activity that underlay the acquisition of property in *Little Lake Misere*. Not "every authorized activity of the United States presents an exercise of its governmental power." *United States v. Burnison*, 339 U.S. 87, 91 (1950). The fact that the United States wishes to increase its assets does not eclipse the state's interests in handling state affairs. See *United States v. Yazell*, 382 U.S. 341, 353 (1946). For example, in *United States v. Fox*, 94 U.S. 315 (1876), this Court held valid a New York law which prohibited the devise to the United States of any real estate situated in New York. Reaffirming the *Fox* holding, this Court in *United States* v. *Burnison*, 339 U.S. 87, held that it was constitutionally

[2] In contrast, in *United States v. Broward County Fla.*, 901 F.2d 1005 (11th Cir. 1990), the Eleventh Circuit was dealing with a situation where application to the local property tax to the federal building involved in that case was specifically authorized by Congress. Thus, the Eleventh Circuit was not confronted with having to conform its holding to this Court's *United States v. New Mexico* holding that, in a factual context such as the one at bar, the state tax must be treated has having been separately imposed upon the federal contractor with the United States not being a direct party to the taxing transaction.

valid for California to prohibit testamentary gifts to the United States:

> It would be anomalous to hold that, because of an amorphous doctrine of national sovereignty, the federal constitutional law reached into a California statute and made impotent that state's restrictions on the designation of beneficiaries . . . [Under the United States' argument] the United States could claim rights under the will to a testator whom the state had declared incompetent, or under a will that had not been witnessed and attested according to the laws of the state. *Id.* at 92.

It would be just as anomalous to enforce the amorphous doctrine of governmental interest espoused by the United States in this case in order to make impotent the very specific restrictions which California has placed on the state-created rights to tax refunds under the California Sales and Use Tax Law.[3] "The federal jurisdictional grant over suits brought by the United States is not in itself a mandate for applying federal law in all circumstances." *United States v. Little Lake Misere Land Co.*, 412 U.S. at 591.

[3] There can be no question that the states have the power to impose relatively short term restrictions on tax refund rights, and that these restrictions can be applied against taxpayers who are claiming refunds on any grounds, including claims that the tax was unconstitutionally collected. *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 45 (1990).

III

THE UNITED STATES' CAUSE OF ACTION CAN ONLY BE BASED UPON ANY REMEDIES WHICH WBEC MAY HAVE HAD WHEN THE UNITED STATES FILED THIS ACTION AND BY THAT TIME ALL OF WBEC'S REMEDIES HAD BEEN EXTINGUISHED

The failure of the United States to state a cause of action for quasi-contract removes the sole purported federal basis for this action. In its complaint, the United States invokes only California law as the basis of its claims. The claims are that respondents have wrongly interpreted California statutes and regulations. It asserts no cause of action except for a refund of state taxes which were paid by WBEC.

It is respondents' position that the analysis in this action must consider the tripartite nature of the relationship between the United States and WBEC, and between WBEC and State of California. The United States had a contractual relationship with WBEC and agreed to reimburse WBEC for taxes paid to the State of California. WBEC was the taxpayer and the state was the taxing agency. The United States does not claim to have been taxed, does not claim to have paid any money directly to the State of California, and does not claim to be the taxpayer. (See above at p. 6.) Indeed, the Ninth Circuit Court of Appeals held that the incidence of the tax under the California construction contractor statute did not fall on the United States. *In re Howell*, 731 F.2d at 628.

In analyzing the facts of this case, it is helpful to examine the relationship between the United States and a federal contractor when the contractor does qualify to

take advantage of the tax immunity of the United States. It is obvious that the only way there could be such a result is that the immunity of the federal contractor is derivative from its contract with the United States. "The defense is that the tax burdens the government and the respondent's right is at best a derivative one." *James v. Dravo Contracting Co.*, 302 U.S. at 158. The opposite is also true. When the taxpayer is not the government, but the contractor, and when the contractor cannot take advantage of the government's tax immunity, the right of the United States to sue for the state taxes paid by the contractor emanates solely from the contract. Therefore, in this case, any rights the United States possessed derive from the contractor's remedies under state law. This did not deprive the United States of a remedy; it provided a remedy which had been extinguished because of the United States' failure to comply with the conditions of that remedy.

The sole ground upon which the United States may state any cause of action against California is that if the taxpayer, WBEC, is due a refund, that refund should go to the United States because of the state tax reimbursement provision of the federal contract. The contractual relationship between the United States and WBEC creates an equitable assignment of WBEC's cause of action against California, which is the definition of a cause of action based on subrogation. *United States v. United Services Automobile Assn.*, 238 F.2d 364, 366 (8th Cir. 1956); *Allianz Insurance Co. v. Municipal Court*, 126 Cal.App.3d 1043, 1046, 179 Cal.Rptr. 334, 335 (1981); *Royal Indemn. Co. v. Security Truck Lines*, 212 Cal.App.2d 61, 64, 27 Cal.Rptr. 858, 860 (1963). The United States, as the subrogee of

WBEC, takes no greater rights than those possessed by the subrogor, WBEC. *United States v. Munsey Trust Co.*, 332 U.S. 234, 242 (1947); *Beecher v. Leavenworth State Bank*, 192 F.2d. 10, 14 (9th Cir. 1951) *cert. den.* 342 U.S. 953; *Liberty Mutual Ins. Co. v. Fales*, 8 Cal.3d 712, 717, 505 P.2d 213, 216, 106 Cal.Rptr. 21, 24 (1974); *March v. Barnet*, 121 Cal. 419, 53 P. 933, 934 (1898); *Randall v. Duff*, 107 Cal. 33, 55, 40 P. 20 (1895); *Redington v. Cornwell*, 90 Cal. 49, 58, 27 P. 40, 42 (1891); *Iusi v. City Title Ins. Co.*, 213 Cal.App.2d 582, 588, 28 Cal.Rptr. 893, 897 (1963). Therefore, when the subrogor has no remedies, the subrogee has no remedies. *Commercial Union Assurance Co. v. City of San Jose*, 127 Cal.App.3d 730, 734, 179 Cal.Rptr. 814, 815-816 (1982). A cause of action based on subrogation is materially different from a primary cause of action. See *United States v. United Airlines, Inc.*, 216 F.Supp. 709 (E.D. Washington, D. Nev. 1962), modified on other grounds 335 F.2d 379 *cert. den.* 379 U.S. 951.

The undisputed facts of this case show that under federal control[4] WBEC paid the tax, filed claims for refund on October 1, 1982 (J. A. 26) and May 25, 1983 (J. A. 37). The claims for refund were denied on November 22, 1982 (J.A. 22) and August 2, 1983 (J. A. 33). WBEC filed suit against the State on February 18, 1983 (J. A. 21) in one suit and on October 26, 1983 in the other suit (J. A.

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[4] The United States argues (Br. at 17, Fn. 8) that it did not submit an administrative claim for refund to the state. The facts established below show that the United States instructed WBEC's attorneys as to the steps to take throughout the administrative proceedings and the state court cases. (J. A. 58, 94, 95, 96 and 102.)

32). In 1988, those suits were dismissed pursuant to United States' direction. (J. A. 44-46; 47-49; 96).

Under California law, a claim for refund must be filed within three years of payment. (California Rev. & Tax. Code, § 6902). A court suit may be initiated only after a claim for refund has been filed (Cal. Rev. & Tax. Code, § 6932) upon only the grounds contained in the claim for refund, and within 90 days of the denial of the claim for refund. (Cal. Rev. & Tax. Code, § 6933). WBEC dismissed its state court suits in 1988, more than 90 days after the denial of the claims for refund, and under Revenue and Taxation Code section 6933 no further suit could then be brought by WBEC. The United States filed this action on May 12, 1988 (J. A. 5).

As subrogee, the United States steps into the shoes of WBEC; thus, the only inquiry is whether WBEC had a cause of action against the State of California available to it when the United States filed this action. See *United States v. United Services Automobile Ass'n*, 238 F.2d at 366. WBEC's substantive right to sue the state for a refund of taxes was created by the State of California. In addition, California conditioned this statutorily-created right by (1) requiring a claim for refund to be filed and (2) fixing the time within which any action must be brought. At least between non-governmental parties, "when the period fixed by its terms has run, the substantive right and the corresponding liability end." *Matheny v. Porter*, 158 F.2d at 479; see also *Midstate Co. v. Pennsylvania Railroad Co.*, 320 U.S. 356, 363 (1943); *The Harrisburg*, 119 U.S. 199, 214 (1886). Unless the United States as WBEC's subrogee is specially exempt from the limitations of California Revenue and Taxation Code section 6933, California's liability

to WBEC and WBEC's right to sue expired prior to the United States' filing of the complaint in this action. The United States, therefore, had no cause of action on May 12, 1988.

IV

WHEN THE UNITED STATES' CAUSE OF ACTION IS BASED UPON THE PRINCIPLE OF SUBROGATION THE CASES HOLDING THAT THE UNITED STATES IS NOT SUBJECT TO STATE STATUTES OF LIMITATIONS ARE NOT APPLICABLE

The sovereign immunity of the United States contains two basic core principles. First, the United States cannot be sued in its sovereign capacity unless it has given consent. Second, when the United States is the plaintiff in an action or has a claim in its capacity as a sovereign, that action or claim is not subject to state statutes of limitations. *Board of County Comm'rs v. United States*, 308 U.S. 343, 351 (1939). These principles do not apply in this case because the United States has not raised sovereign immunity and there are no issues with respect to the Federal Constitution or Acts of Congress.[5]

The United States asserts that there is an absolute and inflexible rule that actions by the United States can

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[5] If the rule promulgated in *Erie Railroad Co. v. Tompkins* applies to the United States when it is not asserting sovereign immunity or Acts of Congress, then it is clear that State law should be followed. Indeed, both *United States v. Summerlin*, 31 U. S. 414 (1916) and *United States v. John Hancock Mutual Life Ins. Co.*, 364 U. S. 301 (1960), relied upon by the United States, involve Acts of Congress as providing the United States' cause of action.

never be subject to a state statute of limitations. For this proposition it relies upon *United States v. Summerlin*, 310 U.S. 414 (1940) and *United States v. John Hancock Mutual Life Ins. Co.*, 364 U.S. 301 (1960). This argument, however, fails to consider the qualitative nature of the rights involved and the source of those rights.

An analysis of *John Hancock* and *Summerlin* reveals that those cases are materially different from this action. In *United States v. John Hancock Mutual Life Insurance Co.* the United States was a second mortgagee of real estate and the issue was whether the United States could redeem the property in one year, as specifically provided by federal law, despite a conflicting state law. This Court found that the only way the United States could be joined in the action was through a federal statute since the United States had not waived its sovereign immunity. As noted above, in the present case there is neither any sovereign immunity context nor any federal statute that properly applies to conflict with the limitations period of California Revenue and Taxation Code section 6933. *Id.* at 303.

In *United States v. Hartford Accident and Indemnity Co.*, 460 F.2d 17 (9th Cir. 1972) *cert. den.* 409 U.S. 979, the Ninth Circuit properly distinguished conventional statutes of limitations as found in *Summerlin* from statutes which " 'create[ ] a condition for the preservation of a potential [state] cause of action. . . . ' " 460 F.2d at 19; accord, *United States v. Studivant*, 529 F.2d 673 (3rd Cir. 1976). In *Hartford*, a Mrs. Rogers was injured in an auto accident and received care and treatment from the United States. The United States made a claim to Hartford, which was denied, and filed suit more than one year after the accident. The Ninth Circuit held that the California statute

requiring suit to be filed within one year of the accident was not a mere statute of limitations, but a prerequisite to the accrual of the cause of action against the insurer and therefore the United States was barred. See also *United States v. State of California*, 655 F.2d 914 (9th Cir. 1980); *United States v. Republic Ins. Co.*, 775 F.2d 156, 159-60 (6th Cir. 1985).[6]

California Revenue and Taxation Code section 6933 fits well within the *Hartford* distinction to the *Summerlin* rule. The equivalent federal statute to California Revenue and Taxation Code section 6933 is 26 U.S.C. § 6532, which sets a two-year limitations period for bringing a suit for tax refunds against the United States. Although in other statutory contexts the matter of limitations is something which must be raised by affirmative defense, when a sovereign such as the United States is sued for tax refunds the statutory time limitations become a jurisdictional issue. The sovereign's consent is the only source of subject matter jurisdiction, and such consent is conditioned upon the action's being brought within the conditions provided by the sovereign. *United States v. Dalm*, 494 U.S. 596, 608 (1990); *Dieckmann v. United States*, 550 F.2d

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[6] The United States attempts to distinguish *Hartford* and *United States v. California* in its brief at 18, n.10 and 23-24, n. 15 by stating that the "waiver of demand" against the State makes this case different from those. The United States errs because at the time it filed suit it did not have a valid claim. A valid claim is the ultimate "condition precedent" to filing any suit. The fact that section 6933 provides that expiration of the limitations period shall be deemed "a waiver of demand against the State" is not inconsistent with the recognition that the statute provides a condition precedent to the cause of action.

622, 623 (10th Cir. 1977). All courts apparently agree that the limitations periods set forth in 26 U.S.C. § 6532 are jurisdictional. See *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 324 (6th Cir. 1990), and cases cited therein; see also *United States v. Dalm*, 494 U.S. 596, 602, 608-10 (1990).

The California Constitution provides for a comparable sovereign immunity as to state taxes. In the quite recent words of the California Supreme Court,

> The California Constitution expressly provides that actions for tax refunds must be brought in the manner prescribed by the Legislature. Article XIII, section 32 of the California Constitution provides in this regard: 'After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, *in such manner as may be provided by the Legislature.*' (Italics added [by the Court].) This constitutional limitation rests on the premise that strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues. [Citation.]
>
> ". . . .
>
> "In sum, article XIII, section 32, of the California Constitution precludes this court from expanding the methods for seeking tax refunds expressly provided by the Legislature. *Woosley v. State of California*, 3 Cal.4th 758, 789, 792; 13 Cal.Rptr. 30; 838 P.2d 758, 776, 778 (1992).

In other words, the terms of the tax refund provisions provided by the Legislature constitute conditions precedent to the continuing existence of a cause of action for

tax refund. " 'Because article XIII, section 32, of the Constitution permits tax refund suits only "in such manner as may be provided by the Legislature," plaintiff's failure to satisfy a statutory condition to suit is fatal to his action. . . . ' " *Shiseido Cosmetics (America) Ltd. v. Franchise Tax Bd.* 235 Cal.App.3d 478, 488, 286 Cal.Rptr. 690, 696 (1991), *cert. den.* ___ U.S. ___, 112 S.Ct. 2995, *reh'g den.*, ___ U.S. ___, 113 S.Ct. 395 (1992). In *Swaggart Ministries v. Cal. Bd. of Equalization,* 493 U.S. 378, 397 (1990) this Court recognized that another one of California Revenue and Taxation Code section 6933's procedural requirements for maintaining a tax refund suit conditioned the ability to proceed with tax refund suits as a matter of California law.

In this context it becomes clear that the Ninth Circuit has correctly held that California Revenue and Taxation Code section 6933, in providing that a claimant "may bring an action" for tax refund only under certain circumstances (one of which is that the action is brought "[w]ithin 90 days after the mailing of the notice of the Board's action upon a claim"), has set conditions which, if not followed, preclude any California cause of action for tax refund. The United States simply fails to recognize that the rule which applies to limit federal tax refund causes of action under 26 U.S.C. § 6532 is equally applicable under California law to limit California tax refund causes of action under California Revenue and Taxation Code section 6933. While only too happy to benefit from this rule when it is acting as a sovereign, the United States wishes to destroy the California version of this rule as soon as the United States is forced to stand in the shoes of a California taxpayer.

It is clear that the *Summerlin* line of cases does not apply to the circumstances of this action and therefore there is no legal escape from the application of the state limitations on the accrual of a cause of action.[7]

V

THERE IS NO PUBLIC POLICY REASON FOR THE UNITED STATES NOT TO COMPLY WITH THE STATE STATUTE OF LIMITATIONS

One of the issues interjected by the United States is that the Court of Appeals decision would leave the United States without an effective remedy. (Br. 26-27). The United States argues that it cannot be expected to be aware of the tax in sufficient time to effectively participate in the administrative process.[8]

The United States fails to recognize that there are somewhat competing sovereign interests at stake. The state has retained, as part of its sovereignty, the authority to tax its citizens and parties doing business in California. Thus, in the exercise of this sovereign power, the State of

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[7] "This court has long followed the rule that, unless the United States was suing in its sovereign capacity, 'in the absence of any provisions of the Act of Congress creating the liability, fixing a limitation of time for commencing actions to enforce it, the statute of limitations of the particular state is applicable.' " (*Occidental Life Ins. Co. v. EEOC,* 432 U.S. 355, 375 (1971) (Rehnquist, J. dissenting in part; quoting *McClaine v. Rankin,* 197 U. S. 154, 158 (1905).)

[8] The United States also argues that it may not be able to protest the tax at the state level. As subrogation is the basis of the United States' remedy, there should be no doubt it can step into the shoes of the federal contractor.

California is entitled to finality of its tax matters. Such finality should be in the province of the state to determine unless that determination conflicts with another, and higher, sovereign power, i.e., the United States asserting its sovereign immunity. Of course, there is no such conflict in this case.

The state requirements are not unreasonable for the United States to meet. After payment of the tax, the United States has three years to file a claim for refund. The claim for refund must specify all the issues that may be included in a court action. Three years after payment is sufficient time for the United States to determine the basis of any claimed refund. After denial of such claim for refund under section 6933, the claimant has 90 days to file its suit for refund.

Indeed, the best evidence that the United States is not harmed by being subject to state law is its total involvement in the state court suits in which WBEC was the plaintiff. WBEC's attorney stated that he was appearing on the petition for redetermination at the direction of the United States Government. (J. A. 58). WBEC's attorney acted at the direction of the United States in WBEC's state court actions. (J. A. 94, 95, 96, and 102). The United States paid $25,000 in legal fees associated with each of the WBEC state court actions. (J. A. 131-135). The United States did everything any taxpayer would have done except appear in the state court actions as a plaintiff. "Equity does not now demand that the United States be given a second opportunity to prove that the tax assessment was erroneous." *United States v. State of California, et al.*, 932 F.2d at 1352 (Pet. App. 15a.)

CONCLUSION

The judgment of the Ninth Circuit should be upheld.

DANIEL E. LUNGREN,
Attorney General of the
State of California
TIMOTHY G. LADDISH
Assistant Attorney General
ROBERT D. MILAM
Deputy Attorney General
Attorneys for Respondents

FOR ARGUMENT

No. 91-2003

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In the Supreme Court of the United States

OCTOBER TERM, 1992

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UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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The right of the United States to invoke the cause of action for "money had and received" to recover taxes and other funds unlawfully held by the States or others is a "long-established right" (*United States* v. *Wurts*, 303 U.S. 414, 416 (1938)). This cause of action is available to the United States whether the defendant has received federal funds directly from the United States or through an intermediary or other third party. See, *e.g.*, *Gaines* v. *Miller*, 111 U.S. 395, 397 (1884); Pet. Br. 16-17. It authorizes recovery by the United States of federal funds that have been "wrongfully, erroneously, or illegally paid." *United States* v. *Wurts*, 303 U.S. at 415. Applying "the usual principle that Federal law fashions

remedies for recovery of funds or property of the United States—including those from invalid tax exactions" (*City of New Orleans* v. *United States*, 371 F.2d 21, 28 (5th Cir.), cert. denied, 387 U.S. 944 (1967)), courts consistently have held that the United States may invoke the federal common law cause of action for "money had and received" to recover unlawful state taxes paid by the United States directly or through its contractual reimbursement of federal agents or contractors.[1] See, *e.g.*, *United States* v. *Benton*, 975 F.2d 511, 513 n.1 (8th Cir. 1992); *United States* v. *Broward County*, 901 F.2d 1005, 1008 (11th Cir. 1990); *United States* v. *DeKalb County*, 729 F.2d 738, 741 (11th Cir. 1984); *City of New Orleans* v. *United States*, 371 F.2d at 28.[2]

[1] The United States was contractually obligated to reimburse the federal contractor in this case for all sales or use taxes imposed by the State (J.A. 141-143, 150-151, 169) and was thus the real party in interest with respect to the taxes at issue.

[2] In each of these cases, the United States had agreed to reimburse a federal contractor for taxes imposed by the States. Contrary to the suggestion of the *amici* States (Br. 7), the taxable entity in the *Broward County* and *DeKalb County* cases was not the United States but was a financial institution that held title to buildings in which the United States possessed an interest. See 901 F.2d at 1006; 729 F.2d at 740. In *City of New Orleans*, the City had successfully argued in the contractor's suit in state court that the United States, not the contractor, was the taxable entity. When the United States then brought suit in federal court to recover the tax, the City changed its position and argued that the contractor was the taxable entity. The Fifth Circuit held that the City was estopped from changing its theory, but concluded that the United States could recover the tax unlawfully imposed on its contractor under the federal common law cause of action for "money had and received." 371 F.2d at 28.

In this case, the court of appeals did not question that federal common law establishes a cause of action for the United States to recover federal funds used to pay unlawful state taxes.[3] Instead, the court held that the quasi-contractual federal cause of action for money had and received applies only to "classic cases of unjust enrichment" (Pet. App. 9a) and that, since "the United States has failed to [comply with state-law refund] claim filing requirements" (*id.* at 14a-15a), "there has been no showing of classic unjust enrichment that would justify the use of a federal common law claim for money had and received" (*id.* at 14a).

Respondents and amici do not attempt directly to defend the stated rationale of the court of appeals. That rationale is incorrect for the reasons discussed in detail in our opening brief (Pet. Br. 12-28), which will not be repeated here.[4] Instead of relying on the

[3] Respondents err in suggesting (Resp. Br. 8 n.1) that the court of appeals concluded that there is no federal cause of action for money had and received by which the United States may recover invalid state tax assessments. The court of appeals expressly acknowledged that federal common law affords a cause of action for recovery of unlawful state taxes paid by the United States when the tax has resulted in "unjust enrichment" of the State (Pet. App. 9a-10a). The court concluded in this case, however, that, because the United States had not pursued available state tax refund procedures, the unlawful state tax assessment did not constitute "classic unjust enrichment" and that the federal remedy *therefore* was not available (*id.* at 9a-10a, 14a-15a).

[4] As we explain in our opening brief (Pet. Br. 18-21), the quasi-contractual federal cause of action for money had and received is subject to the six-year statute of limitations established in 28 U.S.C. 2415(a) for claims "brought by the United

reasoning of the court of appeals, respondents and amici seek to support its judgment on theories that were *not* adopted by that court. The additional theories offered by respondents and amici to support the decision below are equally unavailing.

1.a. Respondents acknowledge that, under the federal common law cause of action for money had and received, the United States may recover state taxes that violate its sovereign immunity or that unconstitutionally discriminate against federal contractors.[5]

States * * * upon any contract * * * implied in law" (*ibid.*). It is not subject to additional or conflicting state-law statutes of limitation or other procedural requirements. See, *e.g.*, *United States* v. *Summerlin*, 310 U.S. 414, 416-417 (1940); Pet. Br. 19.

We acknowledge that the United States did not follow the State's tax refund procedures in this case—including the State's administrative claim filing requirement and its 90-day suit commencement requirement. But, for the reasons discussed in the text and in our opening brief, those state-law requirements are inapplicable to maintenance of the federal common law cause of action for recovery by the United States of unlawful state taxes. While failure to follow the state procedures would be fatal to a state-law refund claim, the claim of the United States is based on federal, not state, law and is governed by federal, not state, rules of procedure and statutes of limitations. See, *e.g.*, *Board of County Comm'rs* v. *United States*, 308 U.S. 343, 351 (1939).

[5] Respondents state that, if a state tax violates the "tax immunity of the United States, there should be no doubt that a quasi-contract cause of action would arise in favor of the United States" (Resp. Br. 5). Respondents do not discuss whether, in that situation, the claim of the United States would be subject to the state-law procedural requirements applicable to the state-law tax refund cause of action. They appear, however, implicitly to accept the basic premise of our submission, which is that when the claim of the United States

Respondents claim, however, that this federal cause of action is available *only* when the state tax "interfere[s] with the performance of federal functions" or infringes the sovereign immunity of the United States (Resp. Br. 5, 6). Respondents assert that, when a state tax assessment is unlawful only under state law—and does not violate the Constitution or statutes of the United States—federal common law provides no remedy for recovery of the unlawful tax by the United States (*ibid.*).

The obvious flaw in respondents' contention—apart from the fact that it is contradicted by the case law (see Pet. Br. 24-25 & n.16)—is that, when the United States officially commits and disburses federal funds, it is *necessarily* performing a "federal function." In the present case, for example, the contractual obligation of the United States to reimburse its contractor for state taxes was in furtherance of an undertaking that is specifically authorized and directed by federal statute—the management and development of the Naval Petroleum Reserve. See Pet. Br. 3 n.1. As this Court stated in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (quoting *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943) (citations omitted by the Court)):

> When the United States disburses its funds or pays its debts, it is exercising a constitutional

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arises under federal common law, it is not circumscribed or limited by state procedures, "state statutes of limitations," or "state notions of laches" (*Board of County Comm'rs*, 308 U.S. at 351), and the federal courts are not "restricted to the remedies available in state courts in enforcing such federal rights" (*id.* at 350).

> function or power. * * * The authority [to do so] had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws [of any State]. The duties imposed upon the United States and the rights acquired by it * * * find their roots in the same federal sources.

For this reason, as the Court has now concluded on several occasions, in the "absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *Ibid.*

The applicable federal common law standard, as described by this Court in *United States* v. *Wurts*, is that the United States may recover federal funds that have been "wrongfully, erroneously, or illegally paid" to the States or others. 303 U.S. at 415. This federal standard has its roots in the common law rule that an action for "money had and received" is available for recovery of money paid for "duties or taxes erroneously or illegally assessed" (*City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) 720, 731-732 (1866)). While federal courts may look to federal *or* state law to determine whether a specific tax is "unlawful" or has been "erroneously" assessed, the cause of action for the recovery of federal funds used to pay such a tax arises under federal common law.[6] *United States* v. *Wurts*, 303 U.S. at 415-416.

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[6] Here, as in analogous examples of federal common law (see *Board of County Comm'rs* v. *United States*, 308 U.S. at 349-352), the federal courts may "borrow" state law in determining whether the state exaction is "unlawful" or "erroneous" and thus meets the requirements of the federal cause of action for recovery of federal funds by the United States. See P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, *The Federal Courts and The Federal System* 768 (2d ed. 1973):

> The federal "command" to incorporate state law may be a judicial rather than a legislative command; that is, it may be determined as a matter of choice of law, even in the absence of statutory command or implication, that, although federal law should "govern" a given question, state law furnishes an appropriate and convenient measure of the content of this federal law.

Accord, P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, *The Federal Courts and The Federal System* 862 (3d ed. 1988).

It is "Federal law [that] fashions remedies for recovery of funds or property of the United States—including those from invalid tax exactions" (*City of New Orleans* v. *United States*, 371 F.2d at 28). See also *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973); *United States* v. *Michigan*, 851 F.2d 803, 810 (6th Cir. 1988).[7]

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[7] In *United States* v. *Little Lake Misere Land Co.*, 412 U.S. at 593 (quoting Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 410 (1964)), the Court stated that "the right of the United States to seek legal redress for duly authorized proprietary transactions 'is a federal right, so that the courts of the United States may formulate a rule of decision.'" Respondents contend (Resp. Br. 8-9) that the Court's statement in the *Little Lake* case has no bearing on this case, because the validity of the State's tax depends solely upon state law and does not stem from the "duly authorized proprietary transactions" of the United States. Respondents' contention, however, ignores the fact that operation of the Naval Petroleum Reserve *is* a "duly authorized proprietary transaction" of the United States. Respondents also ignore this Court's statement in *Kimbell Foods* that, "[w]hen the United States disburses its funds or pays its debts, * * * [t]he duties imposed upon the United States and the rights acquired by it" are, "[i]n absence of an applicable Act of Congress," "for the federal courts to fashion

b. Amici similarly contend that federal common law cannot create a cause of action when "only the correct application of state tax law is at issue" (Am. States Br. 17),[8] arguing that there must be "an identifiable federal interest" or a "uniquely federal interest" for federal common law to apply (*id.* at 19). But, as this Court concluded in *United States* v. *Wurts*, 303 U.S. at 416, the interest of the United States in preventing and remedying unlawful dispositions of its own funds necessarily concerns "an identifiable federal interest" that supports application of federal law. "No statute is necessary to authorize the United States to sue in such a case" (*id.* at 415), and federal courts are therefore authorized "to fashion the governing rule of law according to their own standards" (*United States* v. *Kimbell Foods, Inc.*, 440 U.S. at 726 (quoting *Clearfield Trust*, 318 U.S. at 367)). See also *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504 (1988); *Bayne* v. *United States*, 93 U.S. 642, 643 (1877) (cause of action for money had and received permits the United States to recover federal funds unlawfully held by others); *City of New Orleans* v. *United States*, 371 F.2d at 28 (same). The fact that, in appropriate circumstances, the federal courts may look to state law to determine *whether* the State's possession of federal funds is unlawful does not alter the federal character of the underlying cause of action.[9] See note 6, *supra*.

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* * * according to their own standards" (440 U.S. at 726 (quoting *Clearfield Trust*, 318 U.S. at 366-367)).

[8] "Am. States Br." refers to the brief filed by the States of Arizona, *et al.*

[9] Moreover, as discussed in our opening brief (Pet. Br. 21-22 n.13), proper application of the State's law to the facts of this case requires an interpretation of the federal management contracts made between WBEC and the United States. Issues of federal law, as well as state law, must therefore be addressed in this case in determining whether the State's possession of the federal funds is lawful (*ibid.*).

c. Respondents and amici further err in contending (Resp. Br. 5-6; Am. States Br. 6, 19; Am. Council Br. 7-8 & n.3)[10] that this Court's decision in *United States* v. *New Mexico*, 455 U.S. 720 (1982), points to a contrary conclusion. The question addressed in *New Mexico* concerned the circumstances under which federal contractors are, or are not, immune from state taxation. As we note in our opening brief (Pet. Br. 25-26 n.16), that question is not at issue in this case. We do not contend in this case that the federal contractor is constitutionally immune from the State's tax. Instead, we contend that the State has erroneously and unlawfully applied is own substantive law to impose an improper tax on the federal contractor that the United States was obligated to pay and has paid. As other courts consistently have held, the fact that state law, rather than federal law, was violated in the erroneous state tax assessment "does not change the nature of the cause of action [for money had and received] or limit the United States to state causes of action for this refund of taxes." *United States* v. *Broward County*, 901 F.2d at 1008. See Pet. Br. 24-25; note 6, *supra*.

2. The amici additionally contend (Am. States Br. 8-17) that various federal doctrines that bar or limit private challenges to state taxes in federal courts should apply to actions brought by the United States

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[10] "Am. Council Br." refers to the brief filed by the Council of State Governments, *et al.*

as well. But the federal rules to which amici refer are inapplicable to the claims of the United States.

a. Amici first refer (Am. States Br. 8-9) to the Tax Injunction Act, which generally prohibits federal courts from enjoining the assessment or collection of state taxes (28 U.S.C. 1341). As the cases cited by amici reflect, this statute concerns equitable actions brought by private parties to enjoin state taxes in federal courts. Neither the words of the statute nor the "policies underlying [it]" (Am. States Br. 9) bar an action at law by the United States to recover its own funds as damages under the federal cause of action for money had and received. See *Department of Employment* v. *United States*, 385 U.S. 355, 357-358 (1966); *Board of County Comm'rs* v. *United States*, 308 U.S. at 349-350.[11]

b. Amici also err in contending (Am. States Br. 11-13; Am. Council Br. 9-14) that the doctrine of exhaustion of remedies is applicable to the federal common law action for recovery of unlawful state

[11] In *Board of County Comm'rs*, the Court upheld an award of damages against the State for an illegal tax challenged in a suit brought by the United States. See 308 U.S. at 348-349. That case was decided by the Court two years after enactment of the Tax Injunction Act which, as the Court stated in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943), merely recognized "and gave sanction" to the preexisting practice of federal courts to withhold injunctive relief when adequate legal remedies were available under state law (*id.* at 298-299). Amici plainly err in suggesting (Am. States Br. 10) that the *Great Lakes* decision—which applied the same judicial practice to requests for declaratory relief as the courts previously had applied to requests for injunctive relief—supports their suggestion that a damages remedy is unavailable to the United States for the recovery of unlawful state taxes.

taxes by the United States. In suits by private parties challenging state taxes as violating federal constitutional or statutory requirements, private litigants ordinarily are required first to exhaust their available state-law remedies. See, *e.g.*, *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 109 (1981); *First Nat'l Bank* v. *Board of County Comm'rs*, 264 U.S. 450, 455 (1924). But no case has held that the United States must first resort to state agencies or tribunals to perfect its right to obtain an adjudication of its federal cause of action.[12] The principles of comity and of judicial economy that form the basis of the exhaustion doctrine have no application to suits brought by the United States—suits over which the federal district courts have plenary jurisdiction under 28 U.S.C. 1345.

[12] Amici contend (Am. Council Br. 10) that exhaustion of administrative remedies is a traditional element of the common law cause of action for money had and received. The cases on which amici rely do not support that proposition. The decisions in *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) 720, 732 (1866), and *Elliot* v. *Swartwout*, 35 U.S. (10 Pet.) 137, 153 (1836), describe the necessity for protesting a tax to the collector at the time it is paid as a precondition of thereafter maintaining an action for money had and received against the collector personally. The function of such a protest, as the Court noted, is to place the collector on notice of the taxpayer's claim *before* the collector relinquishes control of the payment to the taxing authority. This common law rule allowed the collector to protect himself against, and satisfy, any judgment thereafter rendered against him for collection of the unlawful tax. 72 U.S. (5 Wall.) at 731-732; 35 U.S. (10 Pet.) at 155-156. See also *Bend* v. *Hoyt*, 38 U.S. (13 Pet.) 263, 266 (1839). That requirement has no relation to the doctrine of exhaustion of administrative remedies. See Pet. Br. 15 n.7.

If, as amici suggest (Am. Council Br. 14), a central purpose of the exhaustion doctrine is to allow the State's taxing authority an opportunity to reconsider its imposition of the tax, the State obviously remains free to do so during the course of the proceedings commenced by the United States in federal district court. And the fact that "issues of state tax law are present" in this case does not support amici's claim that the federal district courts should "defer[] to state decision makers" (*id.* at 13) in adjudicating the claim of the United States. Federal district courts routinely decide questions of state law, both in diversity cases and in other cases involving mixed state and federal law issues. The federal courts are unquestionably competent to determine questions of state law in suits brought by the United States for the recovery of its funds. See, *e.g.*, *Board of County Comm'rs* v. *United States*, 308 U.S. at 349-351.

The federal cause of action for money had and received ultimately turns on whether the State's retention of federal funds is wrongful or illegal. See *United States* v. *Wurts*, 303 U.S. at 415. The unlawful collection and retention of taxes by the State represents a classic example of "unjust enrichment of the state" (*United States* v. *Michigan*, 851 F.2d at 810) which the United States may recover under this federal cause of action. The fact that *additional* state-law remedies *might*, in some circumstances, be available to the United States cannot preempt or negate the federal cause of action. The State's administrative claim filing requirement and its 90-day suit commencement requirement are precisely the type of state-law restrictions that "have no applicability to suits by the Government" to recover its own funds (*Board of County Comm'rs* v. *United States*, 308 U.S. at 351).

In any event, as we point out in our opening brief (Pet. Br. 26), California (along with many other States) allows only the putative taxpayer, and not third parties, to file an administrative refund claim. Respondents do not seriously dispute that the United States had no right under the State's procedures to seek administrative adjustment of the tax assessed by the State on WBEC.[13] Respondents therefore do not join in (or even mention) the evidently hypothetical assertion of the amici that the United States should be required to exhaust non-existent state administrative remedies as a condition precedent to maintaining its federal cause of action for money had and received.[14]

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[13] Respondents suggest, without supporting citation, that the United States, as a "subrogee," should be able to "step into the shoes of the federal contractor" (Resp. Br. 21 n.8). In making that vague and unsupported assertion, respondents do not address the California decisions that deny standing to third parties who seek to challenge state tax assessments. The only exception that the state courts have found to this strict standing requirement is in the limited circumstance, not applicable here, when the putative taxpayer itself "lack[s] a remedy" before the state agency. *State Board of Equalization* v. *Superior Court*, 111 Cal. App. 3d 568, 571 (1980), citing *Javor* v. *State Board of Equalization*, 527 P.2d 1153 (Cal. 1974). Moreover, resort to the state administrative process by the United States would unquestionably have been futile in this case, for the identical administrative claim filed by the federal contractor, concerning the same transactions and raising the same legal objections, was rejected by the state agency. See Pet. Br. 6.

[14] Amici claim that the federal cause of action for money had and received results in inappropriate discrimination "in favor of federal contractors and against state contractors by granting federal contractors *greater* rights than offered other

3. Respondents assert (Resp. Br. 12-21) (i) that the United States has no independent federal cause of action to recover unlawful state taxes and (ii) the United States is therefore merely subrogated to the state-law tax refund claim possessed by the federal contractor, a claim that is now barred by the state-law statute of limitations. As we have shown, the initial premise of these contentions is incorrect. The right of the United States to proceed under federal common law to recover federal funds unlawfully in the possession of others is an independent and "long-established right" (*United States* v. *Wurts*, 303 U.S. at 416). Federal law, not state law, creates the right of the United States to recover its funds and establishes the limitations on the exercise of that right. See, *e.g.*, *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940); Pet. Br. 19-25. The courts consistently have held that the United States may proceed directly, in its own right, to recover federal funds paid by federal contractors to satisfy unlawful state tax assessments. See Pet. Br. 17 (citing cases).

It is undisputed that the six-year federal statute of limitations that applies to this federal cause of action was satisfied in this case. The fact that a state-law tax refund suit may be time-barred by the State's statute of limitations is, quite simply, not relevant to the maintenance of the federal cause of action:

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taxpayers" (Am. States Br. 17). This misconceives the nature of the federal remedy. The federal cause of action for money had and received authorizes the *United States*, not federal contractors, to bring suit to recover unlawfully obtained federal funds. See *United States* v. *Wurts*, 303 U.S. at 415-416. Federal contractors have no right to invoke the remedy and are thus not a favored class.

> It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.

United States v. *Summerlin*, 310 U.S. at 416.

Amici thus err in stating (Am. Council Br. 22) that this case presents the question whether the six-year statute of limitations in 28 U.S.C. 2415(a)—which governs actions brought by the United States upon contracts implied in law—"preempts" the California statute which requires a state-law tax refund suit to be commenced within 90 days after denial of an administrative refund claim (Cal. Rev. & Tax. Code § 6933). The "preemption" question raised by amici is spurious. The federal statute of limitations applies, by its terms, to the federal quasi-contractual cause of action brought by the United States; the state statute of limitations applies, by its terms, to the state tax refund cause of action. Both statutes remain effective. The state statute is not preempted; it is simply not applicable to the federal claim. See, *e.g.*, *United States* v. *Summerlin*, 310 U.S. at 416; *Board of County Comm'rs* v. *United States*, 308 U.S. at 351.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

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No. 91-2003

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA

Petitioner,

v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR THE STATES OF ARIZONA, ARKANSAS, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, IOWA, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, TENNESSEE, TEXAS, VERMONT, VIRGINIA, WYOMING and THE STATE OF NEW MEXICO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Tom Udall
Attorney General
Frank D. Katz
(Counsel of Record)
Special Asst. Attorney General
Taxation and Revenue Department
P.O. Box 630
Santa Fe, NM 87509-0630
(505) 827-0731

33 pp

LISTING OF PARTICIPATING STATES' ATTORNEYS GENERAL OTHER THAN NEW MEXICO

GRANT WOOD
Attorney General
State of Arizona

WINSTON BRYANT
Attorney General
State of Arkansas

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

ROBERT A. MARKS
Attorney General
State of Hawaii

ROLAND W. BURRIS
Attorney General
State of Illinois

BONNIE J. CAMPBELL
Attorney General
State of Iowa

RICHARD P. IEYOUB
Attorney General
State of Louisiana

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

FRANK J. KELLEY
Attorney General
State of Michigan

MIKE MOORE
Attorney General
State of Mississippi

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

WILLIAM L. WEBSTER
Attorney General
State of Missouri

MARC RACICOT
Attorney General
State of Montana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

GEORGE DANA BISBEE
Acting Attorney General
New Hampshire

ROBERT J. DEL TUFO
Attorney General
State of New Jersey

ROBERT ABRAMS
Attorney General
State of New York

LEE FISHER
Attorney General
State of Ohio

SUSAN B. LOVING
Attorney General
State of Oklahoma

CHARLES S. CROOKHAM
Attorney General
State of Oregon

ERNEST D. PREATE, JR.
Attorney General
State of Pennsylvania

CHARLES W. BURSON
Attorney General
State of Tennessee

DAN MORALES
Attorney General
State of Texas

JEFFREY L. AMESTOY
Attorney General
State of Vermont

MARY SUE TERRY
Attorney General
State of Virginia

JOSEPH B. MEYER
ATTORNEY GENERAL
STATE OF WYOMING

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No. 91-2003

In The
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UNITED STATES OF AMERICA,
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v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF NEW MEXICO, *et al.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

The States of New Mexico, *et al.*, file this brief as *amici curiae* in support of Respondent and urge the affirmance of the decision below. *Amici* States each year entertain considerable federal contractor activity resulting in substantial tax payments by these contractors to the States. From time to time disputes arise between contractors and state tax agencies over the amount of tax due. The contractors then have the same rights to protest

assessments of tax and the same period of time in which to seek refunds of tax as all other taxpayers.

This Court's decisions in *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991); *American Trucking Association v. Smith*, 496 U.S. 167 (1990); *McKesson Corp. v. Division of Alcoholic Beverage and Tobacco Division*, 496 U.S. 18 (1990); and *Davis v. Michigan*, 489 U.S. 803 (1989), have graphically brought home to States the degree to which their treasuries are exposed to unexpected, retroactive depletion by tax refunds when widely adopted taxing schemes are declared invalid. *See Harper v. Virginia Department of Taxation*, (U.S. Sup. Ct. No. 91-794). The authority of States to define refund procedures and "enforc[e] relatively short statutes of limitation applicable to refund actions" remains a crucial "procedural protection against any disruptive effects of a tax scheme's invalidation." *McKesson*, 496 U.S. at 50. In setting the refund period, States are able to limit likely exposure to refund claims and balance the need to protect revenues collected for public expenditures against the opportunity for taxpayers to correct mistakes.

The Federal Government here proposes to remove that protection and to undermine State control over refund processes with regard to its contractors and presumably others with whom the Government deals. Rather than accepting the sovereignty of the several States to adopt refund procedures and set statutes of limitation, the Government is proposing a special refund period of six years under 28 U.S.C. § 2415 for federal contractors and presumably for all other taxpayers who are reimbursed by the Federal Government for tax payments. This unequal treatment of an undefined group of taxpayers with regard to taxes on federally-funded projects will make it substantially more difficult for States to predict potential liabilities, plan their budgets and ensure their financial integrity.

While the uncertainty which would result from the Government's proposal would be devastating to States' financial planning, the magnitude of the financial imposition on States is harder to assess. Were the Government and its contractors always to act efficiently and timely, perhaps no additional financial burden would be imposed since tax refunds would presumably be sought within the state statutory periods. But were the Government able to ignore state statutory procedures and, for whatever reason, file long-delayed refund claims, States would be subjected to considerable additional unpredictable liability. States would never know when funds from this year's budget will have to be diverted from the current government services for which they were appropriated to pay refunds of taxes collected over a half decade ago. *Amici* urge this Court to prevent such infringement on state sovereignty and budgetary processes.

SUMMARY OF ARGUMENT

The issue presented by the Government's petition is not whether the federal contractor, and through reimbursement obligation the United States, are entitled to relief from a tax imposed on the contractor under an asserted misinterpretation of California law. Of course the contractor and the United States as its subrogee are entitled to relief, if the state tax law was erroneously interpreted.

The issue is whether our federal system accords sufficient respect to state sovereignty to require that the proper interpretation of state tax law applied to federal contractors be litigated in state courts under state procedures. Since the Supremacy Clause has long been interpreted to permit States sufficient sovereignty under our federal system to impose state tax on federal contractors, *James v. Dravo Construction Co.*, 302 U.S.

134 (1937); *United States v. New Mexico*, 455 U.S. 720 (1982), one would certainly expect that States can impose state tax *procedures* on them.

This case does not involve tax liability imposed on the United States or its instrumentalities. In such case, an argument could be made that the Federal Government should be entitled to litigate its own liability in its own courts. But rather here we are concerned with the authority of States to provide adequate state procedures to determine the tax liability of independent federal contractors under state law. No cogent precedent exists to permit the Government to assert an arcane federal common law action for *indebitatus assumpsit* on behalf of its contractor in an era when state law provides plain, speedy and efficient remedies, including refunds, for illegally imposed tax.

This Court has repeatedly held that matters of state taxation are so important to the sovereignty and existence of state governments that great deference must be paid to state tax procedures. Even when the validity of a state tax under the United States Constitution is challenged, this Court has restrained federal courts from ruling until the state tax process has had a chance to correct the error. The Tax Injunction Act, 28 U.S.C. § 1341, bars federal courts from enjoining state tax programs. Comity bars federal courts from litigating both declaratory judgments in state tax matters and civil rights actions for damages (tax refunds) under 42 U.S.C. § 1983 if the States provide plain, speedy and adequate remedial procedures.

The Government here instructed its contractor to abandon litigation of its tax liability in California courts. Then the Government, itself, brought this untimely action in federal court. It brought suit after the expiration of the state statute of limitations not because of some neglect, inadvertence or error, but intentionally, perhaps to find a more hospitable forum. It

has not so far, and this Court should equally support the States' sovereignty to control their own tax procedures with regard to federal contractors.

ARGUMENT

The United States argues that it should be permitted to bring an untimely tax refund suit several years beyond the state statute of limitations seeking to recover taxes paid, not by itself, but by its contractor. The claim for refund is not based on any constitutional infirmity in the tax but on the alleged misapplication of state law to the contractor. Apparently realizing that this Court does not sit to interpret state law, the Government suggests as the basis for its suit an arcane federal common law cause of action for money had and received (*indebitatus assumpsit*), extended to tax matters many, many years ago[1] before the enactment of statutory procedures for obtaining tax refunds. The Government further argues that it should be allowed to ignore California tax procedures after having specifically directed its contractor to settle a portion of the contractor's timely state refund action and to dismiss without prejudice the balance of the claim.[2] The Government had one bite out of the apple by directing the California refund litigation. Now it seeks a second bite under "federal common law." This Court ought not permit such brazen forum shopping and disrespect for state tax proceedings.

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[1] *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836); *City of Philadelphia v. Collector*, 72 U.S. (5 Wall.) 720 (1866).

[2] The Government's contractor Williams Brother Engineering Company (WBEC) was obligated to keep the Government closely advised of the litigation with the California Board of Equalization. Joint Appendix, pp. 131-132. During the negotiations for settlement, counsel for WBEC made clear that the Government was the ultimate decision maker. Joint Appendix, pp. 94-97.

I. THE CONTRACTOR, NOT THE GOVERNMENT, IS THE TAXPAYER WHOSE REFUND IS AT ISSUE; THE GOVERNMENT IS SUING ONLY AS A SUBROGEE.

In the case at bar, the Government had no liability for the tax paid to California. The Ninth Circuit below specifically discussed this issue of sovereign immunity to assure itself that the California tax was "not imposed directly on the United States, or on a constituent part or instrumentality of the United States," which would have violated the intergovernmental immunity doctrine. 932 F.2d at 1348. The Ninth Circuit correctly concluded that this case is indistinguishable from *United States v. New Mexico*. Here, as there, the federal contractor, WBEC, was liable for and paid the tax. The only liability the Government has is its contractual obligation to reimburse WBEC for its expenses, including tax liability, which this Court held in *United States v. New Mexico* is "constitutionally irrelevant." 455 U.S. at 734-735.[3]

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[3] The Government argues it would be at the mercy of negligent and unconcerned contractors who cannot be relied upon to make timely claims for refund. (Br. 16-17). To the contrary, the Government can easily protect itself, by contract, from having to reimburse contractors for taxes that were not, in fact, owing. See Judge Wellford's dissent in *United States v. Benton*, 975 F.2d 511, 516 (8th Cir. 1992), in which he quotes, with the added emphasis, from the contract there at issue:

> (b) The following types of costs are *not* allowable:
>
> * * * * *
>
> (3) *taxes from which exemptions are available to the contractor directly*. . . . The term *Exemption* means freedom from taxation in whole or in part and includes a tax abatement or reduction resulting from mode of assessment, method of calculation or otherwise.

The Judge then concludes:

> It is important to distinguish this case from those where the Government, itself, is the taxpayer, and where the basis for the challenge to the state taxes is constitutional. The cases relied upon by the Government, particularly *United States v. Broward County, Florida*, 901 F.2d 1005 (11th Cir. 1990); *United States v. State of Michigan*, 851 F.2d 803 (6th Cir. 1988); *United States v. DeKalb County*, 729 F.2d 738 (11th Cir. 1984); *City of New Orleans v. United States*, 371 F.2d 21 (5th Cir. 1967); and *United States v. Independent School District No. 1*, 209 F.2d 578 (10th Cir. 1954), all concerned situations where the Government's own liability was at issue, not the liability of its contractor.
>
> In *United States v. Independent School District No. 1*, the Federal Government sued to obtain excess money it paid to the school district under the community school lunch program. In *City of New Orleans v. United States*, the Federal Government sued the City for a tax refund after the Louisiana Supreme Court had twice ruled that the Government, not Chrysler its contractor, was the owner of the property subjected to tax and, therefore, the relevant taxpayer. In *United States v. State of Michigan*, the Government sued for a refund on behalf of its instrumentality, a federal credit union. The Sixth Circuit noted "[h]ad we found that federal credit unions were not federal instrumentalities entitled to constitutional immunity from state taxation, this argument [that the state statute of limitations should control] would have been attractive." 851 F.2d at 810. In *United States v. DeKalb County* and *United States v.*

> Therefore, assuming that Olin initially was exempt from paying the taxes at issue as the government now contends, such taxes *paid by Olin* to the State of Missouri were *not* reimbursable or "allowable" costs under the contract.

Id., (emphasis in original, footnote omitted).

Broward County, Florida, the Government was the owner of the real property and the taxpayer under the Public Buildings Purchase Contract Act of 1954, 40 U.S.C. § 356, and the Public Buildings Amendments Act of 1972, 40 U.S.C. § 602, respectively. These two Acts subjected the Government to state and local taxes on property it has purchased under the financing arrangements established in those Acts.

Here, there is no question that the state taxpayer was WBEC, the federal contractor. The Government's authorities, therefore, are not pertinent.

II. RECOGNIZING THAT STATE TAXATION LIES AT THE HEART OF STATE SOVEREIGNTY, THIS COURT HAS REPEATEDLY DEFERRED TO STATE TAX PROCEDURES IN A WIDE VARIETY OF CASES.

Allowing the Federal Government intentionally to bypass state tax procedures, as it proposes here, conflicts with the unique deference this Court has shown toward state tax procedures in several contexts. That deference's based on the fundamental nature of the federal system and should inform the Court's decision here.

A. Under the Tax Injunction Act, States are Protected from Federal Court Injunctions Interfering with State Tax Programs so long as the States Provide Plain, Speedy and Efficient Remedies for the Taxpayer.

The Tax Injunction Act, 28 U.S.C. § 1341, provides:

> The district courts shall not enjoin, suspend or restrict the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Act codifies long-standing precedent from this Court that equity powers of the federal court will not be invoked "if the remedy at law is plain, adequate and complete." *Matthews v. Rodgers*, 284 U.S. 521, 526 (1932); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481 (1913); *Boise Artesian Hot and Cold Water Co. v. Boise City*, 213 U.S. 276 (1909). No question has been raised in this case about the adequacy, speed or efficiency of the remedy offered by the California courts. The Government's contractor was fully engaged in California's statutory tax refund litigation when the Government directed the contractor to dismiss those actions in January 1988, just four months before bring this suit in May 1988.

The Tax Injunction Act does not apply to the United States. *Department of Employment v. United States*, 385 U.S. 355, 358 (1966) ("§ 1341 does not act as a restriction upon suits by the United States to protect *itself and its instrumentalities* from unconstitutional state enactments.") (Emphasis added.) But it is not the United States whose tax liability is at issue herein. WBEC is a federal contractor, not a federal instrumentality. The vital distinction between Government instrumentalities and Government contractors remains fundamental and unquestioned in the state tax area. *United States v. New Mexico*.

The policies underlying the Tax Injunction Act have extended deference to state tax procedures to other remedies in addition to injunctions.

B. Federal Courts will not Entertain Declaratory Judgment Actions Challenging the Validity of State Tax Statutes.

In *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), this Court held that federal courts should not displace adequate state procedures to grant taxpayers relief by way of declaratory judgment. Citing the same equitable considerations that prompted the Court in *Boise Artesian* and its progeny to refuse to grant injunctions when "plain, adequate and complete" relief was available from the state, the Court in *Great Lakes* ruled

> [I]t is the court's duty to withhold such relief [by declaratory judgment] when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. . . . This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes.

Great Lakes, 319 U.S. at 300-301. The Court so ruled even though the Federal Declaratory Judgment Act (Act of June 14, 1934, 48 Stat. 955) provided a legal as well as an equitable action for declaratory judgment. Retraint was thus based on more than equitable principles. It was based on the very nature of the federal system and the concomitant respect for state sovereignty.

C. Under the Principle of Comity Derived from the Fundamental Nature of Our Federal System, this Court Requires the Exhaustion of State Remedies Before Permitting Civil Rights Actions to be

Brought in Federal Court under 42 U.S.C. § 1983 to Challenge the Constitutionality of State Taxes.

In *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), this Court held "that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." *Id.* at 116. The Court required the exhaustion of state remedies before permitting federal courts to entertain a federal civil rights action for damages, *i.e.*, a refund of the taxes paid, based on a constitutional defect in the state tax. This deference to state tax procedures derived entirely from considerations of federalism—comity—and the importance of tax to state government.

The Court cited the crucial role taxation plays in the very existence of the sovereign States.

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."

Fair Assessment, 454 U.S. at 102, (quoting *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871).) It went on to note the long history of "reluctance to interfere by prevention with the fiscal operations of the state governments caus[ing] it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired." *Fair Assessment*, 454 U.S. at 109, (citing *Boise Artesian*, 213 U.S. at 282.) It then quoted extensively from several other cases to demonstrate the vitality of the comity principle both before and

after the enactment of the Tax Injunction Act.[4] Finally, the Court concluded that damages actions are no less disruptive of state tax systems than injunctions or declaratory judgments, noting that "[t]axpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety." 454 U.S. at 114. In no area other than state taxation has federal court jurisdiction over § 1983 actions been subjected to an exhaustion-of-state-remedies requirement by judicial fiat.

The four concurring Justices in *Fair Assessment* took a slightly different approach, but reached the same conclusion that state tax procedures should not be displaced by federal court action, even where the state tax is challenged on constitutional grounds. Justice Brennan cited and relied upon the holding in

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[4] "The statute 'has its roots in equity practice, in principles of federalism and in recognition of the imperative need of a State to administer its own fiscal operations.' *Tully v. Griffin, Inc.*, 429 U.S. [68] at 73 [(1976)]. This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes. 81 Cong.Rec. 1415 (1937) (remarks of Sen. Bone) ...." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522, 101 S.Ct. 1221, 1234, 76 L.Ed.2d 464 (1981).

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"'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.' *Id.*[*Great Lakes Dredge & Dock Co. v. Huffman*], at 298, 63 S.Ct. at 1073 (quoting *Matthews v. Rodgers*, 284 U.S. at 525, 52 S.Ct. at 219)."

Fair Assessment, 454 U.S. at 110, 111.

First National Bank of Greeley v. Board of Commissioners of Weld County, 264 U.S. 450 (1924) that "before a litigant complaining of alleged overassessment of taxes may bring a damages action grounded on the Constitution or statutes of the United States, that litigant must fully exhaust any administrative remedies afforded by the State." 454 U.S. at 133.

The same deference for state tax administrative procedures invoked in *Fair Assessment* should apply here, especially where the alleged infirmity in the assessment of tax is the State's interpretation of its own law. In *Fair Assessment*, this Court recognized that the comity afforded State governments appropriately stays a specific, congressionally-mandated cause of action challenging the constitutionality of a state tax. How much more clear then that comity counsels restraint in invoking a judicially-created cause of action concerning the correct interpretation of state tax law.

This deference is particularly appropriate when the judicially-created cause of action has become obsolete with regard to state taxation. Actions for *indebitatus assumpsit* were first applied to tax matters to fill a gap because statutory tax procedures failed to provide a remedy for illegal taxation. That gap has long since been filled by plain, speedy and adequate state tax procedures.

D. The Doctrine of Federal Court Abstention also Counsels Deference to State Tax Procedures where, as here, Vital State Interests are Involved, there is an Adequate State Law Remedy, and the Issue is One of State Law.

The doctrine of federal court abstention, an extension of comity, is invoked when the state interests are "vital" and "important." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11

(1987) (vital state interest in the entry of state court judgment); *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 434 (1982) (state bar disciplinary hearings); *Moore v. Sims*, 442 U.S. 415, 423-424 (1979) (state child abuse proceedings); *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977) (state writ of attachment); *Juidice v. Vail*, 430 U.S. 327 (1977) (state contempt process); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603-605 (1975) (public nuisance statute); *Younger v. Harris*, 401 U.S. 37 (1971) (criminal statute). As discussed above, there is perhaps no more vital state interest than the ability of the States to collect taxes. The abstention doctrine focuses on the availability of a state forum and the possibility that the matter can be resolved by the interpretation of state law.

In *Juidice v. Vail*, the Court found abstention appropriate where, as here, state court proceedings provided the plaintiff with the opportunity to resolve his claim. The Court cited the emphasis in *Huffman* that the core of the *Younger* doctrine of nonintervention was

> "'the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'"

430 U.S. at 334 (quoting *Huffman*, 420 U.S. at 601, quoting *Younger*, 401 U.S. at 44). In discussing whether abstention may be required even when the defendant has not availed himself of the opportunity for a hearing in the state court proceedings, the Court noted that it was simply the *availability*

of the opportunity that was significant. 430 U.S. at 337.[5] The case at bar is very similar to *Juidice v. Vail* in that WBEC was engaged in state court litigation about the very refund at issue here. It was only the dismissal directed by the Government that prevented *all* issues from being resolved in state court.

Of primary importance to the abstention doctrine has been the question of whether state law is likely to be determinative. If the matter at issue may be decided through interpretation of state law, abstention is appropriate. *Pennzoil Co. v. Texaco*, Inc., 481 U.S. at 11-12; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477 (1977). Here, the *only* issue is state law—the correct application of state tax law to WBEC's activites. No constitutional question needs resolution by the federal court.

Thus this case is unlike *United States v. Anderson County, Tennessee*, 705 F.2d 184 (6th Cir. 1983), cited by the United States (Br. 22), where the issue of taxing a federal contractor was constitutional, based on interpreting the contract, not the application of state law. Similarly, *United States v. Bureau of Revenue of the State of New Mexico*, 291 F.2d 677 (10 Cir. 1961) is distinguishable. There, the court held that the United States was not barred by the Tax Injunction Act from obtaining an injunction against the unconstitutional assessment of a state tax. In rejecting the doctrine of abstention the court noted that

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[5] As the Court put it in language particularly pertinent to the case at hand:

> Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. [footnote omitted] No more is required to invoke *Younger* abstention.

Id., (emphasis in original).

this was not a case where "the state statute was fairly open to interpretation that would moot the constitutional question or even change the nature of the problem." *Id.* at 679. Under circumstances where the issues can be resolved by application of state law, as here, the Tenth Circuit commented that abstention "would be warranted and perhaps even required." *Id.*

E. The Intergovernmental Immunity Doctrine, Rooted in Fundamental Notions of Federal and State Sovereignty, Bars Discriminatory Tax Treatment by Federal and State Governments.

The intergovernmental immunity doctrine derived from the Supremacy Clause bars States from discriminating against federal contractors and the Federal Government from discriminating against state contractors. The doctrine and the principles that underlie it protect the States from being required to treat federal contractors *more* favorably, as proposed by the Government here, by allowing a federal contractor to obtain a refund long after the statute of limitations has run for state contractors and all other taxpayer.

It has long been the rule that States may tax federal contractors, but only if they do not discriminate against them—that is, treat them no worse than they treat other taxpayers. *James v. Dravo Contracting Company*, 302 U.S. 134, 149 (1937). Recent decisions of this Court have reemphasized this nondiscriminatory requirement. *See Davis v. Michigan, supra*; *South Carolina v. Baker*, 485 U.S. 505, 525, n. 15, (1988).

Reciprocal protection from discriminatory taxation of state contractors and employees by the federal government has been judicially implied from the States' role in the constitutional scheme. *Id.*; *Massachusetts v. United States*, 435 U.S. 444, 455-460 (1978); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 484-485 (1939); *Collector v. Day*, 78 U.S. (11 Wall.) 113, 125-126 (1871). This reciprocal protection is "to protect the States from undue interference with their traditional governmental functions." *Massachusetts v. United States*, 435 U.S. at 459.

Such protection from discriminatory taxation—constitutionally-based for federal contractors and judicially-implied for state contractors—must also inform the extent to which this Court applies federal common law to require States to discriminate in favor of federal contractors and against state contractors by granting federal contractors *greater* rights than offered other taxpayers.[6] The Supremacy Clause and the reciprocal protection afforded States by the very nature of the federal system ought to bar judicially-created federal common law actions from requiring States to allow federal contractors, and the Federal Government through them, to gain refunds at times and in manners not permitted to other taxpayers.

III. CASES MANDATING DISPLACEMENT OF STATE LAW BY FEDERAL COMMON LAW UNDER THE *CLEARFIELD TRUST* DOCTRINE DO NOT APPLY WHERE, AS HERE, ONLY THE CORRECT APPLICATION OF STATE TAX LAW IS AT ISSUE.

An analysis of the juridical basis for displacing state law with so-called federal common law (what Justice Scalia recently described as pre-emption without congressional action, *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988)) reveals

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[6] Although here it is the United States suing under a cause of action for money had and received, there is no reason to suggest that federal contractors will not also sue on that basis. In fact, one already has. *Kelly-Ryan, Inc. v. State of Nevada*, (1st Jud. Dist. Carson City, No. 91-02091A).

that displacement of state law is not appropriate here. In spite of Justice Brandeis' sweeping language in *Erie R.Co. v. Tompkins*, 304 U.S. 64, 78 (1937), that "[t]here is no general federal common law," this Court has over the years used federal common law to judicially pre-empt state law in matters of crucial federal interest where state law conflicted with that interest. *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943).[7]

> [A] few areas, involving 'uniquely federal interests,' [citations omitted] are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'

Boyle, 487 U.S. at 504. This judicially-ordained pre-emption, however, is the very rare exception. State laws

> should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.

United States v. Yazell, 382 U.S. 341, 352 (1966).

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[7] *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-427 (1964) (international relations); *Howard v. Lyons*, 360 U.S. 593, 597 (1959) (liability of federal officers for defamation); *National Metropolitan Bank v. United States*, 323 U.S. 454, 456 (1945) (liability of the United States on commercial paper it issues).

Under the *Clearfield Trust* doctrine, the displacement of state law by the federal common law will occur only where (1) the topic in question raises uniquely federal interests and (2) a significant conflict exists between an identifiable federal interest and the operation of state law. *Boyle*, 487 U.S. at 504, 507; *United States v. Kimbell Foods, Inc.*, 440 U.S. 714, 726-729 (1979); *United States v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580, 592-596 (1973); *Clearfield Trust*, 318 U.S. at 366-367. This case involves neither of those circumstances. At issue here is the application, or misapplication, of state tax law to a federal contractor. The matter rests exclusively on state law and does not intrude on federal sovereignty interest.

This Court has repeatedly ruled that state taxation of federal contractors does not concern "uniquely federal interests" and does not infringe on federal sovereignty, even where the economic burden of the tax is passed on to the Government. *United States v. New Mexico*; *Alabama v. King & Boozer*, 314 U.S. 1, 8 (1941). As the Court has interpreted the Supremacy Clause to allow States to *tax* federal contractors, it follows that States should be allowed to require federal contractors (and those in privity with them) to follow concededly plain, speedy and efficient remedies to obtain tax refunds where state law was allegedly misapplied. Application of state law would not frustrate specific objectives of any federal program. *Kimbell Foods*, 440 U.S. at 729. There is no need for uniformity in administering federal contracts such as would require that federal law be substituted for state tax procedures in determining whether the state tax was properly interpreted in assessing the federal contractor. State tax procedures do not constitute the kind of "specific aberrant or hostile state rules" that would make their adoption here inappropriate. *Little Lake Misere Land Co.*, 412 U.S. 595-596. The only apparent federal interest the Government can truthfully find here requiring the adoption of federal law is forum shopping. (The Government

did not need the six-year statute of limitation provided by federal law in 28 U.S.C. § 2415. Its contractor had already timely filed refund litigation in California state court.)

The Government in its brief repeatedly cites *Board of Com'rs of Jackson County, Kansas v. United States*, 308 U.S. 343, 350-351 (1939), as a case where state tax law was displaced under the *Clearfield Trust* doctrine. In fact, the Court there did not displace state law. At issue was whether Jackson County was required to add interest to a refund of taxes that had been erroneously paid by an Indian. Although the Court asserted in dictum that state procedures cannot block remedies available to the Government on behalf of an Indian—which language the Government cites in its brief with emphasis and assurance—the Court ultimately looked to *state* law to determine if interest was owed. Significantly, the Court noted in language particularly pertinent to the case at hand, that

> [i]n the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions.

308 U.S. at 352. And yet, the Federal Government would propose just such a privileged position for its contractor here.

A number of cases concerning the propriety of displacement of state law by federal common law have revolved around federal contracts. There is substantial authority that federal common law governs litigation where the "obligations to and rights of the Unites States under its contracts" are at issue. *See Little Lake Misere Land Co.*, 412 U.S. at 592-594. Where the Government's rights under the contract are not at issue,

however—where, as here, the litigation concerns a conflict between the federal contractor and a third party—state law has not been displaced. *Miree v. DeKalb County*, 433 U.S. 25 (1977); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966); and *Bank of America Nat. Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29 (1956). In each of those cases, the dispute focused on the rights or obligations of federal contractors with third parties, not with the United States. In each, the Court ruled that the litigation did not directly affect the United States and state law controlled.[8]

Here, because of WBEC's obligation to repay any refund to the federal Department of Energy, one might argue that this litigation does directly affect the Government. At first blush, such direct affect on the Government would seem to distinguish this case from *Miree*, *Wallis* and *Parnell*. But a comparison of the recent *Boyle* decision, which found added cost to the Government determinative, with this Court's consistent affirmation of the propriety under sovereign immunity of imposing state tax on federal contractors, even where passed on to the

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[8] In *Miree*, plaintiffs sued as third party beneficiaries to a contract between the Government (through the FAA) and the county to recover for injuries sustained as the result of an airplane crash allegedly caused by the placement of a garbage dump too close to the airport in violation of the contract to restrict land use adjacent to the airport. Although resolution of the case involved interpretation of the federal contract, state law was not displaced by federal law. 433 U.S. at 33. *Wallis* concerned a federal mineral lease to a private party and the relationship between the federal lessee and other parties who alleged that they had acquired an assignment of the lease. Even though federal statute authorized assignments of these leases and imposed certain restrictions on them, state law controlled the litigation between the lessee and alleged assignees. 384 U.S. at 69-72. *Parnell* involved commercial paper issued by the United States. At issue was whether the victim of the theft of bonds could recover the money paid to Parnell who cashed them. Even though *Clearfield Trust* had made clear that federal law controls the Government's duty to pay on the bonds, obligations of the payee vis-à-vis third parties were determined by state law. 352 U.S. at 33-34.

Government, shows that such "direct impact" provides no basis for applying federal law to an action for refund of state tax paid by a contractor.

In *Boyle* a five-Justice majority barred recovery by the family of a U.S. Marine killed in a helicopter crash allegedly because of a manufacturer's design flaw. It established the so-called "federal contractor defense" as a judicially-conceived element of federal common law. State law conflicted because it provided for contractor liability. The Court determined that the interest of the United States would be directly affected, if state law permitted liability, because the contractor would pass on to the Government the cost any such potential liability would add to contracts.

> The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price.
>
> * * *
>
> The financial burden of judgments against the contractor would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for Government-ordered designs.

487 U.S. at 507, 511-512.

In the area of state taxation, however, this Court has reached the exact opposite conclusion from that it reached in *Boyle* with regard to the significance of passing on liability from a federal contractor to the Government. Even though the

Federal Government will ultimately bear the economic burden of state taxation imposed on the receipts of federal contractors, federal sovereignty interests do not bar the imposition of the state tax. *United States v. New Mexico*, 455 U.S. at 735.*

This distinction between the Federal Government, its agents and instrumentalities on the one hand and federal contractors on the other has been more sharply drawn in the area of state taxation than in any other area. While in other areas *Boyle* might suggest that a direct economic impact on the Government is sufficient to implicate federal sovereignty and permit application of federal common law, such impact is permissible in the area of state taxation because of the importance of financially viable state governments in the federal system. State law can control a contractor's state tax liability without damage to federal sovereignty interests.

The Government would have the Court believe the Ninth Circuit's decision below is out of step with other Circuits. Rather it is the Government's proposal to extend federal common law to disrupt state tax procedures applied to federal contractors that would upset the balance of federalism established by this Court's precedents.

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* The Court in *United States v. New Mexico* was clear that any expansion of contractor immunity must come from Congress, not the Court.

> If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, by so expressly providing as respects to contracts in a particular form or contracts under particular programs.

455 U.S. at 737.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

TOM UDALL, Attorney General
State of New Mexico
FRANK D. KATZ
Counsel of Record
Special Assistant Attorney General
Taxation and Revenue Department
P.O. Box 630
Santa Fe, NM 87509-0630
(505) 827 0731
Counsel for Amicus Curiae *State of New Mexico*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA and CALIFORNIA STATE BOARD OF EQUALIZATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol St., N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the United States, in pursuing a claim for a refund of state taxes paid by a government contractor allegedly assessed in violation of state law, must exhaust the State's administrative remedies.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments, including questions of state taxing authority and procedure. *Amici* believe that the Court's decision in this case will have a substantial impact on the finality of state and local governments' assessment and collection of taxes.

While the common law recognizes the right of a taxpayer to seek the restitution of illegally exacted taxes, it also recognizes that such suits are disruptive of fiscal planning by government. Accordingly, the common law has long required a party seeking restitution of taxes to have exhausted administrative remedies. This case offers no reason to excuse the United States from compliance with this rule. *Amici* further submit that any rule excusing the United States from compliance with California's refund procedures would disregard the sovereignty of the States under our Constitution in an area vital to their existence as sovereigns.

Because the Court's decision will have a direct impact on this issue of fundamental importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

This case arises out of California's assessment of Williams Brothers Engineering Company (WBEC), a contractor of the United States, for sales and use taxes on personal property WBEC purchased in performance of its contracts. From 1975 through 1981, WBEC contracted with the Department of Energy and the Department of the Navy to manage oil drilling operations at Naval Petroleum Reserve No. 1 in California. J.A. 7, 9-10. Under the contracts, WBEC received a management fee and

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

was reimbursed for various costs, including sales and use taxes it incurred in performing the contracts. *Id.* at 8. Under the contracts, WBEC had authority to, and entered into, subcontracts for construction work. *Id.* at 28. Pursuant to its management of the subcontractors, WBEC purchased personal property for their use in the performance of construction, *id.* at 27-28, but failed to pay California sales and use taxes on these purchases.

On July 5, 1978, upon an audit of WBEC covering the period November 14, 1975, through December 31, 1977, the California Board of Equalization (Board) issued a Notice of Determination assessing WBEC for $2,932,716.54 plus interest for sales and use tax under Cal. Rev. & Tax. Code § 6384. *Id.* at 22. Section 6384 taxes "the gross receipts from the sale of any tangible personal property to contractors purchasing such property . . . as the agents of the United States . . . for use in the performance of contracts with the United States for the construction of improvements on or to real property. . . ." Cal. Rev. & Tax. Code § 6384 (Deering 1975 & Supp. 1992).

On August 3, 1978, WBEC filed a Petition for Redetermination with the Board. J.A. 22. A hearing was held before the full Board on January 8, 1981. *Id.* 51. Although the United States did not intervene in the proceeding, it did direct WBEC in the litigation. *Id.* 57-58; Pet. A. 2a. At the hearing, WBEC argued that the assessment was illegal, contending that section 6384 taxes only purchases of personal property made by a construction contractor. J.A. 66. WBEC maintained that it had acted as a "procurement officer," not a construction contractor, and thus the purchases it made for the construction subcontractors were not taxable. *Id.*

By a decision issued on April 13, 1982, the Board rejected WBEC's interpretation of section 6384 and upheld the assessment.[2] J.A. 22. On May 13, 1982, WBEC

[2] The Board did reduce the assessment by approximately $400,000, J.A. 9, for reasons not clearly indicated in the record.

paid the assessment under protest and, on October 1, 1982, filed a claim for a refund again challenging the applicability of section 6384. *Id.* On November 22, 1982, the Board denied the claim. *Id.* Thereafter, on February 18, 1983, WBEC filed a refund suit in California Superior Court. *Id.* 21.

Meanwhile, on December 13, 1982, the Board, again upon audit, issued a Notice of Determination assessing WBEC for $7,483,062.36 plus interest for sales and use taxes due for the period January 1, 1978, through December 31, 1981. J.A. 33. On January 12, 1983, WBEC paid the assessment under protest and filed an administrative refund claim on May 25, 1983, again challenging the applicability of section 6384. *Id.* On August 2, 1983, the Board denied the claim and, on October 26, 1983, WBEC filed a refund suit in California Superior Court with respect to this assessment as well. *Id.* at 33.

In the refund suits, WBEC sought a total of 14 million dollars and argued that section 6384 was inapplicable to its purchases of personal property for use by the construction subcontractors and government personnel. J.A. 21-23, 32-34. The United States did not intervene in either suit. *Id.* 44-49. In January 1988, WBEC voluntarily dismissed both suits without prejudice after the Board agreed to refund $3 million covering the taxes assessed on personal property used by government personnel. *Id.* 46, 49-50.

Thereafter, on May 12, 1988, ten years after the original Notice of Determination, the United States sued California in federal district court seeking a declaration that section 6384 was not applicable to WBEC's purchases of personal property for the construction subcontractors and a refund of $14 million covering the allegedly illegal assessment plus interest. J.A. 5-11. The parties filed cross motions for summary judgment. Pet. A. 17a. The district court granted California's motion, holding that the United States' failure to file suit within ninety days of the denial of WBEC's administrative claim con-

stituted a waiver of its refund claim. Pet. A. 19a-20a. The district court rejected the United States' argument that the six year statute of limitations of 28 U.S.C. § 2415(a) applied, holding, in essence, that the United States had no claim because it had failed to comply with the ninety day filing period and timely filing was "a condition precedent to liability." *Id.* The district court also concluded that the United States had not made out a case of unjust enrichment. *Id.* 20a-23a. The district court noted that the United States was seeking to relitigate WBEC's entitlement to "a state-created exemption from a state-created sales tax regulation," that without the exemption neither WBEC or the United States "would have a claim [for] 'unjust enrichment,'" and that there was no "unjustness in the state procedures." *Id.* 21a-23a. The United States appealed.

The court of appeals affirmed. The court first recognized that the challenged tax did not implicate the United States' immunity from state taxation under the Supremacy Clause. *Id.* 3a-6a. The court of appeals next held that the United States' claim did "not involve classic unjust enrichment" but was instead "posited upon the interpretation of a state-created exemption from a state created sales tax." *Id.* 9a. Finally, the court of appeals concluded that because section 2415(a) did not by itself confer a cause of action and the United States had failed to file its suit within 90 days of the denial of WBEC's administrative claims, the United States had failed to satisfy an element of its cause of action. *Id.* 11a-12a.

SUMMARY OF ARGUMENT

1. While the common law recognizes the right of a taxpayer to seek the restitution of illegally exacted taxes in an action for money had and received (*indebitatus assumpsit*), it does "not provide for the restitution of tax payments simply because the tax authority collected money to which it was not entitled." 3 George E. Palmer, *The Law of Restitution*, § 14.20 at 246 (1978). Because of the potential disruption to the government's fiscal affairs

which a refund suit entails, it has long been the rule that no cause of action will lie unless the claimant has exhausted administrative remedies. *See First Nat'l Bank v. Board of Comm'rs*, 264 U.S. 450, 455 (1924); *cf. Singer Sewing Mach. Co. v. Benedict*, 229 U.S. 481 (1913). The United States, however, never filed an administrative refund claim in its own right, never petitioned for a redetermination of the tax under Cal. Rev. & Tax. Code § 6561, nor moved to intervene in WBEC's administrative refund claim. It therefore has not satisfied the elements of the cause of action for money had and received.

2. There is no sound reason for excusing the United States from complying with this element of the cause of action. In asserting a cause of action, the United States must establish a prima facie case on each element in the same manner as a private litigant. *See, e.g., United States v. Stinson*, 197 U.S. 200, 204-05 (1905). Moreover, the United States' claim for relief is premised on its having been taxed in violation of state law, Cal. Rev. & Tax. Code § 6384. Section 6384, however, is ambiguous as to whether the purchases of personal property WBEC made on behalf of the construction subcontractors were subject to tax. This ambiguity should have been resolved, in the first instance, by the State's administrative agency and not by federal judges who lack expertise in California's tax code. Nor can WBEC's filing of an administrative refund claim excuse the United States from compliance. As the United States argues, WBEC was a "disinterested" and "nominal party with no financial stake in the outcome." Brief of U.S. at 27. Given this, it was incumbent on the United States to present to the Board its own arguments on the proper construction of section 6384. Principles of federalism and "administrative autonomy require that the agency be given a chance to discover and correct its own errors." *See McKart v. United States*, 395 U.S. 185, 195 (1969).

3. Because the United States never complied with the exhaustion requirement, the Court need not decide whether

28 U.S.C. § 2415(a), which provides for a six year statute of limitations in "every action for money damages brought by the United States . . . founded upon a contract . . . implied in law," preempts Cal. Rev. & Tax. Code § 6933, which requires that a refund suit be filed within ninety days of the denial of an administrative claim. In the event the Court determines that it must decide the issue, *amici* submit that when a tax does not violate the United States' immunity from state taxation under the Supremacy Clause, the Tenth Amendment prohibits Congress from preempting a State's refund suit limitations period. As the Court has long recognized, the power to tax is at the core of sovereignty. *See, e.g., Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). Absent a violation of the Supremacy Clause, congressional preemption of California's limitation period "curtail[s] in . . . substantial manner [the State's] exercise of its powers" and violates the Tenth Amendment. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

Finally, even if Congress has the power to preempt California's limitations period, this Court has required that Congress make its intention "to alter the 'usual constitutional balance between the States and the Federal Government . . . unmistakably clear in the language of the statute.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (citation omitted). Section 2415(a) fails this critical test. Neither the statute nor its legislative history contain any indication that Congress considered the federalism implications of preempting California's limitation period and decided to do so anyway.

4. Contrary to the United States' assertion, the court of appeals' decision will not leave it without an effective remedy. The United States could have petitioned for a redetermination of the tax as well as moved to intervene in the proceedings. *See* Cal. Rev. & Tax. Code § 6561 (Deering 1975 & Supp. 1992); Cal. Civ. Proc. Code § 387 (Deering 1991 & Supp. 1992). Moreover, the

United States had knowledge of the proceedings almost two years before the deadline for the filing of the administrative refund claim and thus had ample time to participate effectively in the process. J.A. 57-58. Finally, the United States' dire forecast that "confusion would reign" if its interests are "subordinated to the vagaries of a mosaic patchwork of procedure," Brief of U.S. at 27, overstates the effect of the court of appeals' decision. In order to vindicate its rights, the United States must necessarily be aware of the substantive tax law; it can surely master the State's refund procedures as well. The Court should accordingly decline the United States' request to grant it an "open season" for challenging state tax assessments.

ARGUMENT

I. THE UNITED STATES HAS NOT SATISFIED THE ELEMENTS OF THE CAUSE OF ACTION FOR MONEY HAD AND RECEIVED BECAUSE IT FAILED TO EXHAUST CALIFORNIA'S ADMINISTRATIVE REMEDIES

As an initial matter, it is important to recognize what is not in issue in this case. The United States' claim for restitution under the common law action for money had and received (*indebitatus assumpsit*) is not premised on its constitutional immunity under the Supremacy Clause from state taxation. *See, e.g., United States v. New Mexico*, 455 U.S. 720 (1982). As both the United States and the court of appeals recognized, this case does not involve a tax which has been levied "directly upon the United States," *Mayo v. United States*, 319 U.S. 441, 447 (1943); nor a tax on an entity "'so intimately connected with the exercise of a power or the performance of a [governmental] duty'" so as to be "'a direct interference with the functions of government itself.'" *New Mexico*, 455 U.S. at 736 (*quoting James v. Dravo Contracting Co.*, 302 U.S. 134, 157 (1937)). Rather, the United States' claim is based solely on an issue of interpretation of state tax law—whether California erroneously assessed

WBEC under Cal. Rev. & Tax Code § 6384 and its implementing regulations, Cal. Sales & Use Tax Reg. 1521, for sales and use taxes on the purchases of personal property WBEC made on behalf of (and which was later installed by) the subcontractors it managed.

The United States' position—that it can now pursue a common law action for money had and received without complying with the State's administrative refund procedure—reflects a thorough disregard for the sovereignty of the States under our constitutional system. Moreover, the United States has failed to satisfy the elements of the common law action upon which it relies. "The common law does not provide for restitution of tax payments simply because the tax authority collected money to which it was not entitled." 3 George E. Palmer, *The Law of Restitution*, § 14.20 at 246 (1978) (hereinafter, Palmer). The federal cause of action has long required that the party seeking restitution of illegally exacted taxes exhaust administrative remedies as a precondition to suit, *see First Nat'l Bank v. Board of Comm'rs*, 264 U.S. 450, 455 (1924); there is no claim for unjust enrichment until the taxing authority denies a refund claim. Given that the tax assessed here did not violate the Supremacy Clause, this case, although couched in terms of the common law action for money had and received, is fundamentally about the proper respect that the United States and the federal courts must accord the States in the administration of their tax systems.[3]

[3] In its brief to this Court, the United States, while acknowledging that section 6384 is not facially unconstitutional, nevertheless suggests that it might constitute "an unconstitutional direct tax on the United States" if it is "interpreted to apply to purchases of property for the United States by a federal contractor, such as WBEC, that did not make a beneficial use of the property." Brief of U.S. at 25 n.16. The constitutionality of the taxes assessed here is not, however, before the Court. In any event, the United States' suggestion is flawed for several reasons. First, under *New Mexico*, a contractor does not become an arm of the United States merely because the title on property it purchases passes immediately to the federal government. *See* 455 U.S. at 742-43. Rather, as long as the contractor has a "substantial independent role in making purchases . . . the identity of interests between the Government and the contractors is far from complete" and the tax does not implicate the Supremacy Clause. *Id.* at 743. The United States has not identified any of the factors which this Court has previously relied on in concluding that a contractor was a "constituent part[]" of the United States as present in the contractual relationship between the United States and WBEC. *Id.* at 741. And, in any case, California agreed to refund the taxes it assessed on the personal property purchased by WBEC which was used or installed by government personnel. Brief of U.S. at 7. It is clear, however, that this refund was not required by the Constitution.

Second, the inquiry under *New Mexico* is not whether the purchasing contractor itself makes a beneficial use of the property but whether the contractor "stand[s] in the Government's shoes." *New Mexico*, 455 U.S. at 736. It is beyond dispute that the subcontractors who installed the property would have been liable to California for the tax if they had themselves purchased the property. *See id.* at 741; *United States v. Boyd*, 378 U.S. 39, 44-47 (1964). It is illogical then to suggest, as the United States has, that a tax on the "middleman," here WBEC, violates the Supremacy Clause when the actual users of that property, i.e., the construction subcontractors, are pursuing "commercial activities carried on for profit" and are not "constituent parts" of the government. *Boyd*, 378 U.S. at 44, 47.

A. Under The Common Law, Exhaustion Of Administrative Remedies Is A Condition Precedent To The Right To Sue The Taxing Authority For Money Had And Received

As a species of quasi-contract, the common law action for money had and received has always been guided by equitable principles. *See, e.g.*, Frederick C. Woodward, *The Law of Quasi Contracts* § 3 at 5 (1913) (hereinafter, Woodward). As Lord Mansfield, in the landmark case of *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760), stated: "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." 2 Burr. at 1012, 97 Eng. Rep. at 681. In its broadest application, the cause of action has two elements: (1) "[t]hat the defendant has received a benefit from the plaintiff" and

(2) "[t]hat the retention of the benefit by the defendant is inequitable." Woodward, § 7 at 9. Thus, the essence of the action is that the defendant's retention of the benefit received is unjust. *Id.* at § 9; *accord Restatement of the Law of Restitution, Quasi Contracts and Constructive Trusts*, § 1, comment c (reprint 1962) ("Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.") (hereinafter, *Restatement*); *see also Bayne v. United States*, 93 U.S. 642 (1876).

While the action for money had and received has been used to obtain the restitution of tax payments, the limitations on this use of the action are significant. As one commentator has noted, "[t]he common law does not provide for restitution of tax payments simply because the tax authority collected money to which it was not entitled." 3 Palmer, § 14.20 at 246. Particularly because the restitution of back taxes has great potential to disrupt the fiscal affairs of government, it has long been the common law rule that recovery will be denied where a tax has been voluntarily paid or no protest has been made. *See, e.g., City of Philadelphia v. Collector*, 72 U.S. (5 Wall.) 720, 732 (1866); *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137, 153 (1836); *cf. Bend v. Hoyt*, 38 U.S. (13 Pet.) 263, 267 (1839). Even where objection has been made to a tax assessment, a taxpayer can waive that objection, thereby forfeiting his right to recover. *Elliot*, 35 U.S. (10 Pet.) at 157 (discussing *Greenway v. Hurd*, 4 Term 553, 100 Eng. Rep. 1171 (K.B. 1792)).

Finally, under the common law, compliance with the taxing authority's administrative refund procedures is a necessary element of the taxpayer's cause of action.[4]

[4] In criticizing the court of appeals' holding that California has not been unjustly enriched, the United States argues that "it is not correct to characterize the State's retention of funds improperly obtained from the United States as 'just' enrichment." Brief of U.S. at 21. This argument simply misapprehends the nature of the inquiry when a claimant seeks restitution of illegally exacted taxes. A taxing authority's retention of illegal taxes voluntarily paid is obviously not "just enrichment." The federal common law, however, did not require the taxing authority to refund such taxes. *See, e.g., City of Philadelphia v. Collector*, 72 U.S. (5 Wall.) at 732.

See First Nat'l Bank, 264 U.S. at 455 ("administrative remedies must be exhausted as a necessary prerequisite to a judicial challenge of the tax"). As a leading authority explained:

> if the assessors, having jurisdiction over the person and property, and acting, so far as the record shows, in compliance with the requirements of a constitutional statute, fall into an error which affects the rights of a person assessed, the vacation or correction of their action, by appeal to the state board of revision or by other proper proceedings instituted for the purpose, *is a condition precedent to the right to sue for restitution.*

Woodward, § 237 at 375 (emphasis added). *See also Stanley v. Supervisors of Albany*, 121 U.S. 535, 550 (1887) ("To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property."); *Restatement*, § 75, comment (1)(a) ("it is frequently provided that there is to be no recovery unless specified steps are taken by the taxpayer, such as bringing proceedings before a board of tax appeals"); 72 Am. Jur. 2d *State and Local Taxation* § 811 (1974). California has codified this common law principle. *See* Cal. Rev. & Tax. Code § 6932 (Deering 1975 & Supp. 1992) ("No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund . . . has been duly filed" with the Board). California's rule is entirely consistent with the common law rule that compliance with administrative refund procedures is a condition precedent to the right to sue

for restitution. *See First Nat'l Bank*, 264 U.S. at 453-56; *Woodward*, § 237 at 375; *see also Stanley*, 121 U.S. at 550; 72 Am. Jur. 2d *State and Local Taxation* § 811 (1974).

As these principles demonstrate, the United States does not state a valid claim for money had and received. Because it failed to comply with the required administrative refund procedure, the United States has failed to satisfy a condition precedent to its right to sue for restitution. *See First Nat'l Bank*, 264 U.S. at 453-56.

In *First Nat'l Bank*, this Court recognized that exhaustion of administrative remedies is a condition precedent to the right to recover for taxes illegally exacted and is an element of the cause of action. There, plaintiff sued a county under the due process and equal protection clauses of the Fourteenth Amendment to recover property taxes it paid which it alleged were substantially higher than the taxes imposed on other property. 264 U.S. at 451-53. Under state law, plaintiff could have challenged the assessment before both the county commissioners and the state tax commission. *Id.* at 451. Plaintiff, however, chose not to do so and instead sued in federal district court, which sustained a demurrer to the complaint. *Id.* at 450. This Court affirmed, noting that:

> It is not suggested that . . . the requirement, already broadly recognized, that administrative remedies must be exhausted as a necessary prerequisite to a judicial challenge of the tax, could be dispensed with. And accepting the decision of the state court that such remedies were, in fact, open and available under the Colorado statutes, it could not be dispensed with.
>
> Plaintiff not having availed itself of the administrative remedies afforded by the statutes, as construed by the state court, it results that the question whether the tax is vulnerable to the challenge in respect of its validity upon any or all of the grounds set forth, is one which we are not called upon to consider.

Id. at 455-56 (internal citations omitted).

The exhaustion requirement is not a meaningless exercise but a "long-settled rule of judicial administration that *no one* is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) (emphasis added). In the state taxation context, the rule serves several purposes.

First, it allows the state agency charged with administering the tax code to apply its expertise. *See McKart v. United States*, 395 U.S. 185, 194 (1969). As state tax codes have become increasingly complex, it is of vital importance that the state taxing authority be given the first opportunity to address a claim. Principles of federalism as well as "notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors." *See id.* at 195. As the Court has recognized in the abstention context, federal courts are "outsiders without special competence in [state] law"; their "independent judgment regarding the application of that law" merits "little confidence." *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496, 499 (1941). The Court has expressly recognized the need for deference to state decision makers when issues of state tax law are present. *See, e.g., Fair Assessment In Real Estate Ass'n v. McNary*, 454 U.S. 100, 108 n.6 (1981) (*quoting Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part) ("questions of state tax law, . . . like issues of state regulatory law, are more properly heard in the state courts")). Where, as here, the state taxing authority has previously addressed and rejected a contractor's claim that it is not liable for a tax, federal courts must exercise restraint because the very purpose of the United States' challenge to that tax in the federal courts is to obtain a ruling that creates a "federal conflict with the state policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943). Such a conflict could perhaps be justified if the tax arguably violated the Supremacy Clause. But where, as here, no such claim is presented, a rule that dispenses with the

exhaustion requirement will result in "'needless friction with state policies'" and reflects a disregard "'for the rightful independence of . . . state governments.'" *Id.* at 332 (*quoting Pullman*, 312 U.S. at 500-01).

An exhaustion requirement serves other purposes as well. The state authority may render a decision favorable to the claimant, obviating further litigation. *McKart*, 395 U.S. at 195. Moreover, where a constitutional question is present, allowing the state agency the first opportunity to interpret its statutes may render the question moot. *See, e.g., Pullman*, 312 U.S. at 498, 501. Finally, requiring exhaustion ensures that taxpayers will not engage in "frequent and deliberate flouting of administrative processes [which] could weaken the effectiveness of the [taxing authority] by encouraging people to ignore its procedures." *McKart*, 395 U.S. at 195.

While all of these reasons may not apply in a particular case, they conclusively demonstrate why exhaustion of administrative remedies is a condition precedent to the right to sue for restitution of taxes illegally exacted. And as with any other contract claim, the satisfaction of a condition precedent is an element of the plaintiff's cause of action. *See, e.g.*, 5 Samuel Williston, *A Treatise On The Law Of Contracts* § 674 (3d ed. 1961); 3A Arthur L. Corbin, *Corbin On Contracts* § 628 (1960 ed.); *see also Jones v. United States*, 96 U.S. 24, 27-28 (1878); *cf.* Fed. R. Civ. P. 9(c). Because of its failure to satisfy this condition, the United States has not established the elements of the common law cause of action for money had and received. The court of appeals thus properly held that California had not been unjustly enriched at the expense of the United States.[5]

[5] Nor can the United States' claim rest on derivative principles because California has not been unjustly enriched at the expense of WBEC. While WBEC protested the tax and pursued both the administrative refund procedure, *see* Cal. Rev. & Tax Code § 6902 (Deering 1975 & Supp. 1992), and a suit against the Board upon the denial of its claim, *see id.* § 6933, WBEC's subsequent voluntary dismissal of its suit constituted a waiver of its protest. *See Elliot*, 35 U.S. (10 Pet.) at 157 (discussing *Greenway v. Hurd*, 4 T.R. 553, 100 Eng. Rep. 1171 (1792)). In *Greenway*, the plaintiff sought the restitution of excise duties. 4 T.R. at 553, 100 Eng. Rep. at 1172. While the plaintiff initially objected and refused to pay the duties because the statute authorizing them had been repealed, plaintiff subsequently paid them. *Id.* The Court affirmed the trial court's grant of a nonsuit, Justice Buller viewing the subsequent payment as a waiver of objection and a voluntary payment. 4 T.R. at 555, 100 Eng. Rep. at 1173; *see also Elliot*, 35 U.S. (10 Pet.) at 157 (*Greenway* "was evidently considered a case of voluntary payment.").

WBEC's voluntary dismissal of its suit was likewise a waiver. As the court of appeals noted, under state law "the legal effect of such [a] dismissal is as though the action[] had never been filed." Pet. A. 11a (citing *Nolan v. Workers' Compensation Appeals Bd.*, 138 Cal. Rptr. 561, 564 (Dist. Ct. App. 1977)). Accordingly, there was no tolling of the ninety day filing period of Cal. Rev. & Tax. Code § 6933. *Id.* Because in keeping with the common law rule, state law further provides that "[f]ailure to bring [an] action within the time specified *constitutes a waiver of any demand against the State* on account of alleged overpayments," Cal. Rev. & Tax. Code § 6933 (Deering 1975 & Supp. 1992) (emphasis added), WBEC waived its objection to the assessment.

Because California's retention of the tax in dispute does not constitute unjust enrichment under the common law with respect to WBEC, the United States' claim can rest on neither the principle of subrogation nor assignment. *See, e.g., United States v. Munsey Trust Co.*, 332 U.S. 234, 242 (1947); *United States v. Nashville, Chatt. & St. Louis Ry.*, 118 U.S. 120, 125 (1886).

[6] In criticizing the court of appeals' holding that the United States was required to pursue California's administrative refund procedure, the United States notes that "[a] refund request . . . was, however, submitted by the federal contractor." Brief of U.S.

B. There Is No Sound Reason For Excusing The United States From Complying With The Common Law Rule

The United States ignores this fundamental principle of the law of unjust enrichment. Instead it argues that "its rights are not circumscribed or limited by state procedures, 'state statutes of limitations,' or 'state notions of laches.'"[6] Brief of U.S. at 18 (quoting *Board of County*

Comm'rs v. United States, 308 U.S. 343, 351 (1939)).[7] To be sure, this Court has held that in some circumstances, the United States, in enforcing its rights, cannot be barred by either state statutes of limitations or laches. *See United States v. John Hancock Mutual Life Ins. Co.*, 364 U.S. 301, 308 (1960); *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Board of County Comm'rs*, 308 U.S. at 351. But none of the cases cited by the United States held in any sense that it is excused from complying with a State's administrative refund procedure when it pursues a claim founded on state law. *See generally id.*; *cf. United States v. Burnison*, 339 U.S. 87, 91-93 (1950) (United States, in pursuing claim based on state law, could not rely on Supremacy Clause to invalidate state law); *United States v. Fox*, 94 U.S. 315, 320-21 (1877) (same).

Moreover, when the United States asserts a cause of action, it is required to establish a prima facie case on each element of a cause of action in the same manner as a private litigant.[8] *See, e.g., United States v. Stinson*,

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at 17 n.8. While the significance of this point is not entirely clear, if the United States means that it should be excused from compliance with California's administrative refund procedure because WBEC pursued such a claim, that can hardly be squared with its other contention—that the enforcement of its rights cannot be left "to the diligence of disinterested federal contractors." *Id.* at 27.

[7] The United States cites *Board of County Comm'rs* for the proposition that it cannot be subjected to state administrative procedures. Brief of U.S. at 18. While *Board of County Comm'rs* does discuss the applicability of time bars, it neither discusses nor even obliquely refers to administrative procedures.

[8] The only case even arguably supporting the United States is *Causey v. United States*, 240 U.S. 399 (1916), in which the United States brought a suit in equity to annul public land patents fraudulently obtained. In *Causey*, defendants argued that the suit could not be maintained because the United States had not offered to return the consideration received. *Id.* at 402. The "ordinary rule" was "that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received." *Id.* The Court rejected Causey's argument, noting that "the purpose [of the suit] is not merely to regain title, but also to enforce a public

197 U.S. 200, 204-05 (1905) ("The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual."); *Nashville, Chatt. & St. Louis Ry. Co.*, 118 U.S. at 125 ("When the United States, through their lawfully authorized agents, become the owners of negotiable paper, they are obliged to give the same notice to charge an endorser as would be required of a private holder."); *see also Cooke v. United States*, 91 U.S. 389, 398 (1875); *United States v. Barker*, 25 U.S. (12 Wheat.) 559, 561 (1827). As this Court recognized in *First Nat'l Bank*, exhaustion of state administrative refund procedures is a condition precedent to the right to sue for restitution and an element of the federal cause of action. 264 U.S. at 455-56. The United States is thus in error when it asserts that the court of appeals' "decision turns the Supremacy Clause on its head" because "[t]he existence of a state remedy cannot preempt a federal remedy." Brief of U.S. at 23. The Supremacy Clause is hardly turned on its head when the federal remedy itself requires exhaustion of state administrative remedies as an element of the cause of action. *First Nat'l Bank*, 264 U.S. at 456; *cf. McNary*, 454 U.S. at 116; *Illinois Commerce Comm. v. Thomson*, 318 U.S. 675, 686 (1943).[9]

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statute and maintain the policy underlying it" and that it was for Congress to decide whether the consideration should be refunded. *Id.* Accordingly, the United States did not sue under the same cause of action as was available to private litigants. Moreover, given that the United States was enforcing a congressional enactment, any court-imposed requirement that it must return the consideration in order to maintain the suit would have invoked serious separation of powers concerns. In the instant case, however, the United States has not sued to enforce a congressional enactment but to recover funds alleged to have been exacted in violation of state tax law. The United States should thus be treated no differently than any other taxpayer.

[9] Moreover, it cannot be said that California's administrative refund procedure "unduly circumscribe[s]" the United States' rights. *See* Brief of U.S. at 23 (quoting *Board of County Commis-*

Given (1) that the federal common law remedy has long required exhaustion of state administrative remedies and (2) that there can be no argument that the tax assessed here violated the Supremacy Clause, there is no reason to excuse the United States from complying with the common law rule. On its own behalf, the United States does little more than state its bald conclusion that its "sovereign interests . . . should not be subordinated to the vagaries of a mosaic patchwork of state procedure."[10] Brief of U.S. at 28. But "our Constitution establishes a system of dual sovereignty between the States and the Federal Government," *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2399 (1991), for it is "founded upon the total or partial incorporation of a number of distinct sovereignties." Alexander Hamilton, *The Federalist* No. 82, p. 458 (I. Kramnick ed., 1987). "[T]he Court's consistent understanding" is that " 'The States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.' " *New York v. United States*, 112 S.Ct. 2408, 2418 (1992) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985)). Neither sovereign has the power to "destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

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sioners, 308 U.S. at 351). California's procedure does not discriminate against the United States but applies to all claimants seeking a refund. *See* Cal. Rev. & Tax. Code § 6906 (Deering 1975 & Supp. 1992). Nor is it burdensome. The claim can be "in writing" and need only "state the specific grounds upon which [it] is founded." *Id.* at § 6904. There is no filing fee. *See generally id.* at §§ 6901-08. Finally, the very notion that the United States' rights cannot be "unduly circumscribed" implies that its rights can be limited by reasonable state law requirements when it acts as a plaintiff.

[10] The United States does present a parade of the horribles that it asserts will occur if it is subjected to state procedures. *See* Brief of U.S. at 26-27. As we explain at pp. 27-30, *infra*, the United States' arguments do not withstand serious scrutiny.

No function of state government goes more to the core of its sovereignty than the power to tax. *See, e.g., Bode v. Barrett*, 344 U.S. 583, 585 (1953). Federal interference with that function, whether by the courts or Congress, has limitless potential to disrupt the operation of state governments. Accordingly, this Court has long recognized "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *McNary*, 454 U.S. at 102. As long ago as *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108 (1871), this Court stated:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in proceedings of the officers, upon whom the duty is devolved of collecting taxes, may derange the operations of government, and thereby cause serious detriment to the public.

78 U.S. (11 Wall.) at 110. This Court has steadfastly adhered to these principles in rejecting various attempts to interject the federal courts into state tax matters. *See generally McNary*, 454 U.S. at 102-103, 107-113 (Section 1983 action); *see also Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) (declaratory judgment action); *Matthews v. Rodgers*, 284 U.S. 521 (1932) (suit for injunction); *First Nat'l Bank*, 264 U.S. at 453-56 (action for money had and received); *Singer Sewing Mach. Co. v. Benedict*, 229 U.S. 481 (1913) (suit for injunction).

Requiring the United States to comply with California's administrative refund procedure cannot in any sense be characterized as an attempt by the State to destroy the United States as sovereign or substantially curtail the exercise of its rights. *Metcalf & Eddy*, 269 U.S. at 523. California only seeks to impose the same requirement on the United States that it imposes on every other party seeking a tax refund from the state treasury. The purpose

of this requirement is not to discriminate against the United States nor unduly burden it with an additional hurdle to obtaining relief. Rather, the State's purpose is to provide an efficient mechanism for the timely and correct resolution of disputes, avoid needless disruption of its fiscal planning, and ensure that the administrative agency it has charged with responsibility for administering its tax laws will be given the first opportunity to apply its expertise. If, indeed, the Board has gotten it wrong (presumably because WBEC, as a "disinterested" and "nominal party with no financial stake in the ou come" presented inadequate arguments to it, *see* Brief of U.S. at 27), then requiring the United States, as "the real party in interest," *id.*, to present its arguments to the Board is essential to the proper resolution of its claim.

A contrary holding would, by contrast, substantially curtail California's exercise of its sovereignty. Section 6384 is ambiguous as to whether the property purchased by WBEC for the use of the subcontractors it managed is subject to taxation.[11] This ambiguity should be resolved, in the first instance, by the State's administrative agency—not by federal judges who lack expertise in California's tax code.[12] *Cf. Pullman*, 312 U.S. at 499-

[11] In providing for the taxation of sales of personal property to federal contractors "purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property," Section 6384 does not state that purchasers of property are subject to tax only if they actually perform the construction.

[12] It is well established that the California courts defer to the Board's reasonable interpretation of the California Revenue and Taxation Code. *See, e.g., Coca Cola Co. v. State Bd. of Equalization*, 25 Cal. 2d 918, 921 (1945) (administrative interpretation of tax laws "is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized"); *American Hospital Supply Corp. v. State Board of Equalization*, 215 Cal. Rptr. 744, 746 (Dist. Ct. App. 1985) ("Administrative interpretation of a statute by the agency charged with its enforce-

501; *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 865-66 (1984).

Moreover, the federal courts cannot grant the United States the relief it seeks without interpreting section 6384 in a manner that conflicts with the prior and presumptively valid interpretation of the statute given by the State's agency in the administrative proceeding brought by WBEC. Such an interpretation would go well beyond creating " 'needless friction with state polic[y].' " *Burford*, 319 U.S. at 332 (quoting *Pullman*, 312 U.S. at 500). Rather, it would necessarily intrude on California's exercise of its sovereignty by precluding it from taxing in a constitutionally authorized manner. Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). As the Court has recognized, the sovereign power of the United States does not include the power to "curtail in any substantial manner [California's] exercise of its powers." *Metcalf & Eddy*, 269 U.S. at 523. If the United States is to resort to the federal courts whenever it believes a contractor has been taxed in violation of state law, then, at a minimum, this Court must require the United States to have presented its arguments to the taxing authority to "give [it] a chance to discover and correct its own errors." *McKart*, 395 U.S. at 195. The "important and sensitive nature of state tax systems," *McNary*, 454 U.S. at 102, and the Court's " 'scrupulous regard for the rightful independence of the state governments,' " *Burford*, 319 U.S. at 332 (*quoting Pullman*,

ment is entitled to great weight unless shown to be clearly erroneous or unauthorized."). This rule also applies to the Board's interpretation of its regulations. *See, e.g., id.* "The Board's administrative determination" concerning the application of a tax statute or regulation "may be overturned only if that determination is 'arbitrary, capricious or without rational basis.' " *Id.* (*quoting Culligan Water Conditioning v. Board of Equalization*, 130 Cal. Rptr. 321, 324 (Cal. 1976)).

312 U.S. at 501), require no less.[13] The United States' status as sovereign thus provides no basis for exempting it from complying with the long settled rule "that administrative remedies must be exhausted as a necessary prerequisite to a judicial challenge of the tax." *First Nat'l Bank*, 264 U.S. at 455.

II. THE SIX YEAR STATUTE OF LIMITATIONS OF 28 U.S.C. § 2415(a) DOES NOT PREEMPT CALIFORNIA LAW

The United States has never complied with this condition precedent to its right to sue for restitution. The Court thus need not address whether 28 U.S.C. § 2415(a), which provides for a six year statute of limitations for "every action for money damages brought by the United States . . . which is founded upon any contract express or implied in law or fact," preempts California's requirement that a refund suit be filed within ninety days following the denial of an administrative refund claim. *See* Cal. Rev. & Tax. Code § 6933 (Deering 1975 & Supp. 1992). Even if 28 U.S.C. § 2415(a)'s six year statute of

[13] To be sure, the federal courts have jurisdiction over any "Controvers[y] to which the United States shall be a Party." U.S. Const. art. III, § 2, cl. 1. In the absence of an authoritative decision of the state courts, the existence of jurisdiction in the federal courts does not warrant their deciding a question of state tax law. At least thirty-five States authorize their courts to answer questions of state law upon certification by the federal courts. Paul M. Bator, *et al., Hart and Wechsler's The Federal Courts and the Federal System* 1381 (3d ed. 1988). In those instances where the United States has exhausted the available state administrative remedies, a federal court could retain jurisdiction while using the procedure available for certifying questions of state law to the state courts. *See, e.g., Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). If the state court decides that the state taxing authority has misinterpreted the statute, the federal court can then grant relief upon that basis to the United States without intruding on state sovereignty because it will merely be applying the decision of the state court. This procedure, however, would not be available in cases similar to this one. Because the United States never acquired a cause of action, the federal courts cannot retain jurisdiction while they wait for the United States to exhaust administrative remedies.

limitations applies and the United States' cause of action on each claim did not accrue until WBEC's administrative refund claims were denied on November 22, 1982, and August 2, 1983, respectively,[14] the six year limitations period has since expired without the United States having exhausted its administrative remedies. Accordingly, *amici* submit that the Court can affirm the decision of the court of appeals on this basis alone.

In the event that the Court determines that it must decide whether section 2415(a) displaces California law, *amici* submit that Congress cannot preempt a State's choice to limit the time period in which a refund suit may be brought when that suit is not premised on any violation of the Constitution but relies solely on state law for the entitlement to the refund. The decisions relied on by the United States, *Board of County Comm'rs*, *Summerlin*, and *John Hancock*, do not support the proposition that the Constitution authorizes congressional preemption of California's refund suit limitations period as applied here. None of these cases involved a suit by the United States against a State—an entity whose independent sovereignty is expressly recognized by the Constitution.[15] *See, e.g.*,

[14] The United States took this position in the court of appeals. *See* Brief for Appellant at 14, *United States v. California*, 932 F.2d 1346 (9th Cir. 1991) (No. 89-15833).

[15] To be sure, in *United States v. Minnesota*, 270 U.S. 181 (1926), this Court rejected the State's claim that suit was barred by a state statute of limitations. *Id.* at 195-96. The nature of the United States' claim in *Minnesota*, however, was far different from that which it asserts here and did not implicate principles of federalism in a manner similar to this case. In *Minnesota*, the United States brought suit to cancel land patents it granted to the State under the swamp land grant. *Id.* at 192. The United States filed the suit largely because of a treaty obligation it had with the Chippewa Indians "to apply the lands and the proceeds of their sale exclusively to the use, support, and civilization of the" tribe. *Id.* The Constitution, however, commits the treaty power to the President and the Senate, *see* U.S. Const., art. II, § 2, cl. 2; and, under the Supremacy Clause, a treaty preempts contrary state law. *Id.*, art. VI, cl. 2. In the face of these constitutionally explicit grants of

U.S. Const. amend. X; *New York*, 112 S. Ct. at 2417-18; *Gregory*, 111 S.Ct. at 2399.

Moreover, a holding by this Court that section 2415(a) preempts California law would substantially curtail California's exercise of its sovereignty. Under the United States' view, its causes of action did not accrue until the Board denied WBEC's administrative refund claims; the six year statute of limitations of section 2415(a) thus did not begin to run until the Board denied WBEC's claims. In effect, the United States asks the Court to grant it an "open season" for challenging state tax assessments to long beyond the time when those funds were spent. A holding adopting this position will upset the States' reliance upon the finality of their tax assessment and refund proceedings, create uncertainty in state fiscal affairs, and prompt additional litigation. Recognizing the need for finality in their State's fiscal affairs, the people of California have chosen to limit the time period in which they have waived their sovereign immunity by allowing refund suits to be brought. Where, as here, a suit seeks a refund of a tax allegedly assessed in violation of state law and not the Supremacy Clause, failure to honor California's choice to limit the time in which it can be sued "curtail[s] in . . . substantial manner the . . . exercise of its power" in the core sovereign area of taxation.[16] *Metcalf & Eddy*, 269 U.S. at 523; *see also McNary*, 454 U.S. 102-03, 110-12.

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authority to the federal government, Minnesota's claim that the suit was barred by its statute of limitations did not implicate any principle of federalism. Indeed, a holding by this Court that the United States' claim was barred by Minnesota's statute would have "curtail[ed] in . . . substantial manner the [federal government's] exercise of its powers." *Metcalf & Eddy*, 269 U.S. at 523.

[16] California's ninety day filing period has not "curtailed in . . . substantial manner the [federal government's] exercise of its power." *Metcalf & Eddy*, 269 U.S. at 523. California's ninety day period for filing a refund suit only commences once the Board denies a refund claim. It thus does not include the time which elapses from the taxpayer's receipt of a deficiency determination

Finally, even if Congress has the power to preempt California's limitations period, this Court has long required Congress to have faced up to its choice before it construes legislation as altering the traditional balance between the federal government and the States. *See, e.g., Gregory*, 111 S.Ct. at 2401 (quoting cases). "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). This plain statement rule thus ensures that the "procedure for lawmaking on which *Garcia* relied to protect states' interests" will not be circumvented by Congressional ambiguity. *Gregory*, 111 S.Ct. at 2403 (quoting L. Tribe, *American Constitutional Law* § 6-25, p. 480 (2d ed. 1988)).

Section 2415(a) fails this critical test. While the text of the statute refers to "every action for money damages . . . founded upon any contract express or implied in law or fact," 28 U.S.C. § 2415(a), it makes no explicit reference to the States or to its applicability in the state tax refund context. Yet the statute expressly addresses its

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until that determination becomes final (which may include the time involved in filing a petition for redetermination if the party chooses to do so), *see* Cal. Rev. & Tax. Code § 6561 (Deering 1975 & Supp. 1992); the six-month period for filing an administrative refund claim that commences when a deficiency determination becomes final, *see id.* § 6902; nor the period that elapses while the administrative claim is being litigated and adjudicated. As the record indicates with respect to the deficiency covering the period Nov. 14, 1975, through December 31, 1977, more than four and a half years elapsed from California's issuance of the initial deficiency determination on July 5, 1978, until WBEC filed its suit challenging this assessment on February 18, 1983. *See* J.A. 9, 22, 24. The record further indicates that the United States was aware of the assessment at least as early as January 8, 1981, twenty-two months before the required filing of the administrative refund claim and more than two years before the required filing date of the refund suit. *See* J.A. 57-58 (statement of Arthur Armstrong, attorney for WBEC).

applicability to government suits against employees for "the recovery of money erroneously paid to" them, 28 U.S.C. § 2415(d), another category of cases brought under the action for money had and received. It is unlikely that Congress would give this situation special attention—to "provide for an equitable and realistic solution which is in the interest of both the Government and the individual concerned," Senate Comm. on Judiciary, S. Rep. No. 1328, 89th Cong., 2d Sess (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2505—while at the same time preempting state statutes of limitations in refund suits without giving that matter any attention. Given the traditional solicitude which Congress has shown for state tax administration, *see* 28 U.S.C. § 1341 (Tax Injunction Act), Congress would not have preempted state tax refund limitations periods without expressly stating so.

The legislative history of section 2415 confirms this view. The Senate Report incorporates language from the House Report, H.R. Rep. No. 1534, expressing the purpose of the statute—that "*private litigants* can be assured of a more fair and balanced treatment when dealing with the Government." S. Rep. No. 1328, *reprinted in* 1966 U.S.C.C.A.N. at 2503 (emphasis added); *see also id.* at 2509 ("In recommending this legislation, the committee feels that it will provide a greater fairness as regards *private individuals* who deal with the Government while adequately providing for the interests of the Government.") (emphasis added). The legislative history makes no similar reference to the States as litigants and, in the only language mentioning the States, the Senate Report merely notes the similarity of the legislation to state law. *See id.* at 2507 (discussing exclusions from limitations period), 2508 (general discussion). Given the failure of Congress to mention expressly that it intended to preempt the States' tax refund limitations periods, the general purpose of the legislation to limit the time period in which the federal government

could bring its suits, and Congress' statements that the legislation was similar to state laws, it is clear that Congress did not intend for section 2415(a) to preempt California's limitations period.

III. REQUIRING THE UNITED STATES TO COMPLY WITH STATE PROCEDURES DOES NOT DEPRIVE IT OF AN EFFECTIVE REMEDY

In the United States' view, many untoward consequences flow from the judgment below. First, it asserts that "[t]he court of appeals' decision would often leave the United States without an effective remedy to contest" an improperly exacted tax. Brief of U.S. at 26. According to the United States, many States "allow only the putative taxpayer [and] not third parties . . . to file an administrative refund claim" and refund suit. *Id.* Next, the United States argues that it "cannot reasonably be expected to be aware of the tax (or the legal issues involved) in sufficient time to participate effectively in the state administrative process." *Id.* at 26-27. The United States further argues that limiting it to state remedies "effectively requires the litigation to be waged by the . . . contractor—a nominal party with no financial stake in the outcome." *Id.* at 27. Finally, the United States predicts that "confusion would reign . . . if the United States were left to the laws of the 50 States" in pursuing its claims. *Id.* None of these contentions can withstand scrutiny.

The United States' first contention—that it lacks an effective state remedy because California as well as many other States allow only the putative taxpayer and not third parties to file administrative refund claims and refunds suits—is contradicted by the opportunity it had, as a real party in interest, to participate in both the administrative and civil actions under California law. For example, Cal. Rev. & Tax. Code § 6561 (Deering 1975 & Supp. 1992) specifically provides that not only the taxpayer but also "any person directly interested may petition [the Board] for a redetermination" of a defici-

ency determination. Moreover, under Cal. Civ. Proc. Code § 387, the United States could have intervened, as a matter of right, in the state court proceedings.[17] *See, e.g., Timm Aircraft Corp. v. Byram*, 213 P.2d 715 (Cal. 1950); *Kaiser Co. v. Reid*, 184 P.2d 879, 881 (Cal. 1947). Finally, the United States could have filed a refund claim.

The United States' second contention—"that it cannot reasonably be expected to be aware of the tax (or the legal issues involved) in sufficient time to participate effectively in the state administrative process"—is similarly contradicted by the record, the nature of cost-plus contracts, and its own regulations. As the record indicates, the United States was aware of the assessment as early as January 8, 1981, the date of the hearing on WBEC's petition for redetermination. *See* J.A. 57-58 (statement of Arthur Armstrong, attorney for WBEC). Moreover, under Cal. Rev. & Tax. § 6902, the administrative refund claim was not required to be filed until six months after the Board's decision on the petition became final.[18] As the record indicates, the Board's Notice of Redetermination did not become final until approximately May 13, 1982, and, consequently, the administrative refund claim was not required to be filed for another six months. *See* J.A. 26; *see also* Cal. Rev. & Tax. Code § 6902 (Deering 1975 & Supp. 1992). A minimum of twenty-two months thus elapsed from the time the United States was aware of the assessment until it was required to file in the administrative refund action. The United States' suggestion that it lacked ample time

[17] Similar rules apply in other States. More than thirty States, for example, have adopted the Uniform Law Commissioners' Model State Administrative Procedure Act (1981). *See* Walter Gellhorn *et al., Administrative Law* 1238-42 (1987). Section 4-209 specifically provides for intervention in adjudicative proceedings. *See id.* at 1269.

[18] In addition, under California law, the Board's decision on the petition for redetermination did not become final until "30 days after service upon the petitioner of notice thereof." Cal. Rev. & Tax. Code § 6564 (Deering 1975 & Supp. 1992).

to participate effectively in the administrative refund action simply strains credulity.

Moreover, it is difficult to fathom why the United States cannot write its contracts in a manner that will adequately protect its interests by requiring its contractors to notify it whenever a State alleges that additional taxes are due. It is not beyond the power of the United States' lawyers and contracting officers to draft such clauses or to condition reimbursement of any tax assessed on the contractors' timely notification. *See* J.A. 131 (modifying basic contract to require WBEC to "[c]onfer with and provide documentation to DOE on all pertinent developments regarding outstanding litigation"); 48 C.F.R. § 52.229-4 (tax clause, para. (g)) ("The Contractor shall promptly notify the Contracting Officer of all matters relating to Federal, State, and local taxes . . . that reasonably may be expected to result in either an increase or decrease in the contract price and shall take appropriate action as the Contracting Officer directs."); *id.* § 29.304(a) ("With coordination of the agency-designated counsel, a contract may . . . require that the contractor take certain actions with regard to payment, non-payment, refund, protest, or other treatment of a specified tax."); *cf.* 48 C.F.R. § 52.229-4 (tax clause, para. (e)) (providing for decrease in contract price for any tax the contractor "does not obtain a refund of, through the [c]ontractor's fault, negligence, or failure to follow instructions of the [c]ontracting [o]fficer").[19] Finally, the Federal Acquisition Regulations

[19] It is also noteworthy that the Federal Acquisition Regulations (FAR) provide for the insertion of a special clause when a federal contractor operates within the State of New Mexico. This clause includes the following provision:

> The [agency] may receive information regarding the Contractor from the Revenue Division of the New Mexico Taxation and Revenue Department and, at the discretion of the [agency], may participate in any matters or proceedings pertaining to this clause or the above-mentioned agreement. This shall not pre-

contemplate timely notification by instructing contracting officers to discourage contractors "from negotiating independently with taxing authorities" in the case of cost-reimbursement contracts. 48 C.F.R. § 29.101(c).

The United States' final contention—its dire forecast "that confusion would reign if [it is] left to the laws of the 50 states" and if its interests are "subordinated to the vagaries of a mosaic patchwork of state procedure" —simply overstates the practical effect of the court of appeals' holding. When the United States pursues a refund claim it must, after all, necessarily understand the State's substantive tax law—an area recognized for its great complexity. Given this, it is difficult to understand why the United States cannot master the incremental task of determining what the State's refund procedures require. Moreover, throughout this litigation the United States has maintained that its cause of action did not accrue until WBEC's administrative refund claim was denied. Clearly then, to assert the federal remedy, the United States must be cognizant of state administrative procedures for it cannot assert its cause of action before it accrues. And even when a State does not require that an administrative refund claim be filed as a condition precedent to a refund suit, the United States must still be cognizant of state procedures because its cause of action presumably would accrue at an earlier time. In short, even under the federal cause of action, the United States must be aware of a State's administrative refund procedures if it is to vindicate its rights.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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clude the Contractor from having its own representative nor does it obligate the [agency] to represent its Contractor.

48 C.F.R. § 52.229-10 (New Mexico Gross Receipt Tax clause, para. (g)).

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol St., N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the
Amici Curiae

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